IN THE

Supreme Court of the United States

October Term, 1978

No. 79-205

STANLEY R. RADER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

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This is a companion case to *Worldwide Church of God v. State of California,* No. 78-1720, now pending before this Court on Petition for Writ of Certiorari. In this case Petitioner Stanley R. Rader respectfully prays that a Writ of Certiorari issue to review a final determination by the California Supreme Court that Petitioner has no right to refuse to submit to interrogation after the State Attorney General has advised Petitioner of his *Miranda* rights and declared he would supply Petitioner's interrogation testimony to pending and contemplated criminal investigations.

Opinion Below.

On May 7, 1979, the Los Angeles Superior Court ordered Petitioner to submit to interrogation by the California Attorney General in the action *People v. Worldwide Church of God, Inc., et al.* (Los Angeles

Sup. Ct. No. C 267607). A Petition for Writ of Prohibition/Mandate to the California Court of Appeal was denied on May 25, 1979. The California Supreme Court denied a Petition for Hearing on July 5, 1979. (A copy of the Supreme Court's order is attached as Appendix A.)

Jurisdiction.

This Court's jurisdiction rests on 28 U.S.C. section 1257(3).

Questions Presented for Review.

1. Can the State of California, consistent with the Religion Clauses of the First Amendment, maintain an action against Petitioner and his Church to obtain and audit all Church records, pass on the propriety of religious expenditures, remove and replace Church leaders, and restructure Church governance, and in connection therewith compel Petitioner, a high Church official and personal advisor to the spiritual leader of the Church, to submit to comprehensive interrogation concerning Church affairs?

2. Can the State of California, consistent with the Fifth and Fourteenth Amendments, compel Petitioner to submit to interrogation by the State Attorney General after the Attorney General advised Petitioner of his *Miranda* rights and announced his intention to supply Petitioner's statements to any pending or contemplated criminal investigation and Petitioner has invoked his right to remain silent?

Statutory and Constitutional Provisions Involved.

The rights asserted by Petitioner arise under the Religion Clauses of the First Amendment, and the Fifth and Fourteenth Amendments of the United States

Constitution. Respondent grounds its authority in part on California Corporations Code section 9505 which appears as Appendix B.

Statement of the Case.

A. Related Litigation.

The first phase of the State of California's assault on the Worldwide Church of God is already before this Court for review on Petition for Writ of Certiorari in *Worldwide Church of God v. State of California,* No. 78-1720. In that first phase the State Attorney General obtained appointment of a receiver *ex parte* on the basis of allegations and representations by some dissident ex-members that Church officers were misappropriating assets, liquidating Church property below value and destroying Church records.[1] Refusing to acknowledge that any First Amendment rights were involved, the trial court put a receiver in possession and control of Church operations, records and assets. After two months, the court dissolved the receivership but ordered the Church to make virtually all of its records available to the Attorney General for inspection; when the Church appealed from this order, the trial court reinstated the receivership as punishment. The California Supreme Court by a 4-3 decision declined to review the First Amendment issues inherent in the receivership proceedings, and the Church petitioned this Court for vindication of its First Amendment freedoms.

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[1]These allegations were later found to be false. While the Attorney General continues to charge "misappropriation", as he uses the term it means expenditures of which he disapproves.

The Attorney General has meanwhile launched the second phase of his assault on the Church, its leaders and their First Amendment freedoms, through discovery proceedings. The Attorney General has already obtained, without the Church's knowledge or consent, over 800 Church documents, including those of the most sensitive and confidential nature, *e.g.*, letters to the ministry, contribution data, mailing lists, internal communications, and complete financial information for at least the last ten years.[2] Discovery proceedings take place virtually on a daily basis. The Attorney General has noticed depositions for all of the major Church officers, including Herbert W. Armstrong, Pastor General and spiritual and temporal leader of the Church. If permitted to take these depositions, the Attorney General will achieve through discovery many of his objectives in this lawsuit, including comprehensive review of all Church records, and, should Church leaders decline to testify, disparagement of their reputations with the Church membership and perhaps their incarceration.

In these discovery proceedings the trial court has again accepted and endorsed the Attorney General's argument that First Amendment rights are not involved.

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[2]Petitioner cannot be certain how the Attorney General came into possession of this material. It seems likely, however, that the receiver, who confiscated boxloads of Church documents in early January, delivered them to the Attorney General as directed by court orders of January 12 and 19.

There is a striking parallel between this case and *Lo-Ji Sales, Inc. v. New York*, ... U.S. ...., 60 L.Ed.2d 920 (1979) in which a court officer issued a virtually blank search warrant which he then helped execute by personally inspecting materials and authorizing seizure of items later included in the warrant. As this Court admonished (60 L.Ed.2d at 927): "This search warrant and what followed on petitioner's premises are reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect."

B. The Present Proceeding.

As the present litigation has developed since January 2, Petitioner Stanley R. Rader (who is the chief personal advisor to Herbert W. Armstrong, the spiritual and temporal leader of the Church) has emerged as one of the principal targets of the Attorney General's attack. Both in open court and to the media, the Attorney General has repeatedly vilified and disparaged Petitioner, accused him of theft and fraud, and has addressed him and described him in language utterly inappropriate for a public official in a judicial proceeding.[3]

On April 3, 1979, the Attorney General commenced taking Petitioner's deposition. Petitioner answered some questions, but he refused to answer others on First Amendment grounds. When the deposition resumed on April 4, the Attorney General advised Petitioner of his *Miranda* rights, including his right to remain silent (Exh. E,[4] p 98). Petitioner exercised his right to remain silent and the deposition was terminated (Exh. E, p. 100).

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[3]Characteristic of the fury of the Attorney General's attack on Petitioner is language in his First Amended Complaint in which the Attorney General seeks an order removing Petitioner and other Church leaders from any position of leadership in the Church and *forever* barring them from holding such positions in the Church or in *any* charitable corporation in California. In other words, the Attorney General in a civil proceeding seeks an order stripping Petitioner and others of their civil rights as if they were convicted felons. Indeed, we know of no rule of law which would permit a court to bar even a convicted felon from holding church office, contrary to the fundamental Christian doctrine of redemption.

[4]All exhibit references are to those accompanying the Petition for Writ of Prohibition/Mandate in the California Court of Appeal.

The Attorney General then reversed himself and sought an order compelling Petitioner to resume his deposition notwithstanding the *Miranda* warning and Petitioner's invocation of his right to remain silent (Exh. F). The trial court requested the Attorney General to file a declaration from the head of his Criminal Division stating Petitioner is not the subject of any pending or contemplated criminal investigation (Exh. H, pp. 6-9), but the Attorney General failed to do so. Instead a Deputy in the Attorney General's Charitable Trust Section filed a declaration stating that his office had not conducted any such proceeding or investigation *to date*, but emphasizing that it was the Attorney General's obligation and intention to refer any possible evidence of criminal conduct to the appropriate enforcement agencies (Exh. I).[5]

Nevertheless, the trial court ordered Petitioner to resume his deposition on May 29, 1979, and overruled all First Amendment objections to questions asked before the *Miranda* warnings were given (Exh. A; Exh. L, pp. 12, 15-16; see Notice of Ruling, attached as Appendix C).

Clearly, the Attorney General is attempting to use an unconstitutional civil proceeding which is virtually limitless in scope and which requires no showing of

[5]In a document filed in the California Supreme Court in this proceeding, the Attorney General has stated it is well known Petitioner is the subject of a pending "criminal proceeding." He did not elaborate. Petitioner is aware that the criminal branch of the Internal Revenue Service commenced an investigation in January, 1979, shortly after the present action began (no doubt at the instigation of the Attorney General or the dissident ex-members who initiated the action). Petitioner is also informed that the Attorney General has been funneling information obtained in this case to the Los Angeles District Attorney's Office. Petitioner is unaware of any "criminal proceeding" aside from these investigative activities.

probable cause to believe there has been wrongdoing, as a means of eliciting testimony which he intends to use in connection with subsequent criminal prosecution. As a basis for his interrogation, the Attorney General possesses over 800 detailed, confidential and illicitly-obtained Church documents; he has repeatedly accused Petitioner of crimes without any supporting evidence; he has given him a *Miranda* warning; he has assured the court he intends to refer any evidence of possible criminal conduct to other law enforcement agencies; and it appears he is in fact funneling information to such agencies. Notwithstanding, Petitioner was ordered to reappear for deposition and to answer questions.

While pursuing state appellate remedies, Petitioner declined to appear as ordered. The State sought a contempt citation and hearing on the matter is now scheduled for August 7, 1979.

Finality of Judgment Below.

Petitioner has been denied relief by the highest court in the state. This judgment, on a collateral matter in which Petitioner is threatened with irremediable loss of his rights, is final. (See, *e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 195 n. 12 (1977); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 485 (1975); *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Construction Laborers v. Curry*, 371 U.S. 542, 549 (1963); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945).)

If relief is not granted now, Petitioner confronts a Hobson's choice. As a high officer of the Church and personal advisor to its spiritual and temporal leader,

Petitioner is privy to the most sensitive, confidential and privileged Church information. His refusal to divulge this information on First Amendment grounds has already been rejected. His only remaining vehicle for refusing to disclose this information, and the one urged on him by the Attorney General, is the assertion of the privilege against self-incrimination. Petitioner should not be forced to assert such a privilege. Were he to do so it would be used to disparge him in the eyes of the Church membership,[6] and the Attorney General will attempt to bar his testimony at trial. (See *A. & M. Records, Inc. v. Heilman,* 75 Cal.App.3d 554, 142 Cal. Rptr. 396 (1977).) Yet if Petitioner stands on his First Amendment objections he risks a contempt citation and incarceration.

Sooner or later, the constitutional issues will have to be determined by this Court. The only question is whether it will be now, before Petitioner and the Church suffer further injury and infringement of First Amendment rights, or later, after the Attorney General has succeeded in destroying the Church in California, seriously impairing its religious programs worldwide,[7] compromising the privacy and sanctity of Church documents, and irreparably and unjustifiably staining the reputation of the Church leadership.

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[6]Thus the Attorney General continues to act in harmony with the goals of the dissident ex-members who initiated the action.

[7]To date, this action, including the receivership, has cost the Church in excess of $5,000,000 in lost revenues, additional expenses and the like. As a result, vital Church programs have been crippled: The National Youth Program has been cancelled, distribution of important Church literature has been cut by 40%, Church employees including ministers have been dismissed, and welfare payments to Church families to permit them to attend religious convocations have been curtailed. (Declaration of Willis J. Bicket, Appendix C to Petition for Certiorari, No. 78-1720.)

REASONS FOR GRANTING THE WRIT.

I

The State's Action Against the Worldwide Church of God Violates Religious Freedoms Guaranteed by the First Amendment. Petitioner May Not Be Forced to Testify in Proceedings Which Exceed the Constitutional Power of the State.

A. Petitioner Has No Duty to Testify in Proceedings Beyond the Jurisdiction of His Inquisitor.

Petitioner may not be required to testify in proceedings which are beyond the jurisdiction of inquiry of the officer conducting the interrogation.

For example, in *Gojack v. United States,* 384 U.S. 702 (1966), this Court held that a witness could not be held in contempt for refusing to testify before a congressional investigative committee which was unauthorized to conduct the inquiry. Similarly here, Petitioner may not be compelled to testify in an inquiry by the Attorney General which is absolutely forbidden by the Religion Clauses of the First Amendment. (See also, *DeGregory v. Attorney General,* 383 U.S. 825, 829 (1966); *Sweezy v. New Hampshire,* 354 U.S. 234, 254 (1957) ["[I]f the Attorney General's interrogation of petitioner were in fact wholly unrelated to the object of the Legislature in authorizing the inquiry, the Due Process Clause would preclude endangering of constitutional liberties."].)

B. The Free Exercise and Establishment Clauses of the First Amendment Bar the Attorney General From Civil Jurisdiction to Supervise the Affairs of a Church.

The Attorney General, claiming the State has supervisory authority over churches, seeks to take control of the assets and records of the Worldwide Church

of God, to review and audit all Church records, to remove and replace present Church leaders, to restructure Church polity, and to determine whether Church assets are used for a proper religious purpose. The attempt to interrogate Petitioner is but one component of the State's exercise of a general supervisory power over the affairs of religious organizations. In the State's view, this supposed common-law/statutory (California Corporations Code §9505) power results simply from the State's characterization of the Church as a "public or charitable trust."

The mere statement of this premise illustrates the impermissibility of the proceedings under the First Amendment. Yet the California courts have turned a deaf ear to all claims of First Amendment rights. They have implicitly rejected the following holdings of this Court on the subject of church-state separation:

1. A state cannot strip a church of its religious character by labelling it a charitable trust, any more than it can label a Jehovah's Witness who sells the Bible or religious tracts "merely a bookseller" (*Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)).

This Court has repeatedly rejected state or federal action which would subject religious institutions to state control applicable only outside the protective sphere of religion. Most recently, in *N.L.R.B. v. Catholic Bishop of Chicago*, ... U.S. ....., 59 L.Ed.2d 533 (1979), this Court rejected the National Labor Relations Board's claim of jurisdiction over "religiously associated" private institutions which otherwise met the Board's jurisdictional requirement. To the Board, a church school was just a school and church teachers merely employees. This Court refused to let the Religion

Clauses of the First Amendment be swept aside by this simplistic characterization, stressing that religious schools involve religious teaching and teachers at such schools fulfill a religious function (59 L.Ed.2d at 541-543).

2. A state cannot constitutionally operate a church (*Everson v. Board of Education*, 330 U.S. 1, 15 (1957) ["Neither a state nor the Federal Government can set up a church . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."]).

3. State supervision of church affairs necessitates unconstitutional entanglement with religion (*Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) ["A comprehensive, discriminating, and continuing surveillance . . . will involve excessive and enduring entanglement between state and church."]).

4. More specifically, the accounting of church finances results in unconstitutional entanglement even where the church is willing to accept an audit (*Lemon v. Kurtzman, supra*, 403 U.S. at 621-622 ["In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state."]).

5. A state cannot constitutionally determine whether church funds are properly spent for religious purposes (*New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ["The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitu-

tional guarantee against religious establishment . . . ."]; *Cf. Presbyterian Church v. Blue Hull Mem. Presb. Church*, 393 U.S. 440, 449-450 (1969) [". . . First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice . . . . [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role."]).

6. A state cannot constitutionally dictate the manner of church governance or decide who shall and shall not be a church leader (*Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) [Freedom of religion encompasses the power of religious bodies "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"]; *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) ["[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government . . . ."]; *Lemon v. Kurtzman, supra*, 403 U.S. at 625 ["The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . . ."]; see *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J. concurring) ["To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine." (N. omitted.)]).

The State's actions in the instant case plainly contravene these principles. By proceeding in this constitutionally-impermissible fashion the State exceeds its jurisdiction. Absent jurisdiction to inquire into and supervise the affairs of the Worldwide Church of God, the Attorney General may not compel Petitioner to testify.

II

The Order Compelling Petitioner to Testify While Concurrent Criminal Proceedings Are Pending Subverts His Constitutional Rights Under the Fifth and Fourteenth Amendments.

Since January of this year the criminal branch of the Internal Revenue Service has been conducting an investigation of Petitioner presumably based on the same events and circumstances under investigation by the State in the instant proceedings. Petitioner is also informed that the Attorney General has supplied and is supplying other criminal law enforcement agencies with information obtained by it in this supposedly civil proceeding.[8] Petitioner contends that to compel him to submit to deposition by the Attorney General under such circumstances would subvert his constitutional right not to be called as a witness against himself as well as his right to due process of law.

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[8]Indeed, while the Attorney General refuses to admit (or deny) that he has supplied other agencies with information, he has announced his intention to "refer any possible evidence of criminal conduct to those agencies primarily responsible for the enforcement of such criminal laws." (Exh. I.)

A. The Attorney General May Not Conduct a Civil Proceeding to Discover Evidence for Use in a Criminal Prosecution.

The Attorney General may not employ civil proceedings for purposes of conducting a criminal investigation. Yet there is weighty evidence that he is doing this very thing, using this lawsuit as a "shortcut to goals otherwise barred or more difficult to reach." (*United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).)

1. The Attorney General has gone on record that in 1978 he conducted an investigation which "revealed to a substantial certainty" that Petitioner was "guilty of misuse and misappropriation of millions of dollars." (Response to Order to Show Cause re Preliminary Injunction, p. 4, filed on or about April 4, 1979, in *Lopez, et al. v. State of California,* Los Angeles Superior Court No. C 276767). Since that time he has evidently received massive amounts of material from the receiver and possibly others describing in great detail Petitioner's relationship with the Church. Nevertheless, even now the Attorney General holds criminal action in abeyance, continues to seek civil discovery in the present action, and attempts to force Petitioner to testify in deposition.

2. Refusing to submit a declaration from the local head of his Criminal Division, the Attorney General instead submitted a declaration of a person in the Charitable Trusts Section, who later explained *he had been told* there was no pending criminal proceeding or investigation by the Attorney General.[9]

[9]Since the Attorney General has vehemently resisted informing Petitioner of the pendency of criminal investigations or proceedings, he can hardly argue that Petitioner's lack of knowledge forecloses objection that his constitutional rights are threatened by the concurrence of such proceedings. Indeed, the danger to Petitioner is exacerbated by this fact. (See *United States v. Rand,* 308 F.Supp. 1231, 1237 (N.D. Ohio 1970).)

3. The Attorney General expressly refused to respond to interrogatories inquiring as to which other law enforcement agencies he is furnishing information obtained in this suit, objecting that Petitioner is not entitled to these facts. At the same time, the Attorney General has revealed he is in possession of over 800 Church documents, including letters to the ministry, contribution data, internal memoranda, and detailed financial information for a period of more than ten years. It appears that the bulk of this information, including the most sensitive and privileged materials, was unlawfully obtained.[10]

4. The Attorney General's giving of the *Miranda* warnings was a clear signal of the criminal base underlying the civil veneer of the proceedings. (See *United States v. Hankins,* 565 F.2d 1344, 1351 (5th Cir. 1978) ["The *Miranda* warnings given to Smith by the [Internal Revenue Service] was a clear signal of his potential criminal liability."].)

The Attorney General has skillfully wedged Petitioner into an incredible trilemma. Petitioner can (1) testify, in which case First Amendment rights are lost and anything he says may be used against him in pending or contemplated criminal proceedings; (2) stand on the First Amendment without asserting the Fifth Amendment, in which case he may be found in contempt and jailed, or (3) assert the Fifth Amendment,

[10]This evidence of the Attorney General's misuse of this civil proceeding should alone preclude further efforts to depose petitioner. (*Cf. United State v. Kordel,* 397 U.S. 1, 7, 11 (1970); *United States v. Simon,* 373 F.2d 649, 652 (2d Cir. 1967), vacated as moot 389 U.S. 425 (1967).)

in which case this fact will be used to disparage him with Church membership and may be asserted as a bar to his testimony at trial.

Had no *Miranda* warnings been given, Petitioner could prevent the Attorney General from making any use of his deposition should it be determined warnings were required. (*United States v. Lipshitz,* 132 F.Supp. 519, 523 (E.D.N.Y. 1955); *United States v. Guerrina,* 112 F.Supp. 126, 128-131 (E.D. Pa. 1953); and see *Romanelli v. C.I.R.*, 466 F.2d 872, 878-879 (7th Cir. 1972).) But since the warnings *were* given, Petitioner cannot later complain they were not or plead ignorance of the potential criminal use against him of his deposition.

If the Attorney General's ploy succeeds, Petitioner will have "had his rights" but have been powerless to enforce them. Both the requirement of due process of law and the Fifth Amendment compel condemnation of the Attorney General's conduct. Petitioner cannot constitutionally be compelled to resume his deposition.

B. The Attorney General May Not Call Petitioner as a Witness Against Himself While Criminal Proceedings Arising From the Same Alleged Facts Are Pending.

United States v. Parrott, 248 F.Supp. 196 (D.D.C. 1965), frames the initial question for analysis (at p. 199):

> "May the Government by bringing a parallel civil proceeding avail itself of the almost unlimited opportunity that a civil litigant has to take extensive depositions of the other party to the civil proceeding and then utilize the fruits of this interrogation . . . in the preparation of the criminal case?"

To frame the question is to answer it. In *Parrott,* "The court holds that the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution." (At p. 202.) (See, also, *McSurely v. McClellan,* 426 F.2d 664, 671-672 (D.C. Cir. 1970) ["[C]ivil discovery may not be used to subvert limitations on discovery in criminal cases either by the Government or by private parties." (Ns. omitted.)]; *Campbell v. Eastland,* 307 F.2d 478, 487 (5th Cir. 1962), cert. denied 371 U.S. 955 ["A litigant should not be allowed to make use of the liberal civil discovery proceedings applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery. . . ."].)

The instant case varies from these cases only in that, to Petitioner's knowledge, the California Attorney General has not yet filed his own criminal charges. The Attorney General is cunningly attempting to rush discovery to completion here *before* criminal proceedings are brought by him. There is no question he intends to bring criminal proceedings or have them brought even though, as Petitioner believes, the evidence will exonerate him of all accusations of criminal conduct.

In *Perry v. McGuire,* 36 F.R.D. 272 (S.D.N.Y. 1964), plaintiff sought discovery against a defendant who faced criminal charges on the basis of the same facts alleged in the civil suit. In holding that civil discovery should be stayed pending determination of the criminal proceedings, the Court stated (at p. 273):

> "Assuming that the complaint sets forth a valid cause of action in fraud and deceit [citation], it seems clear that to require defendant . . . to respond to over 100 interrogatories at this time

would be oppressive and would infringe on his constitutional rights. [Citations.] [¶] The same must necessarily be true as to the noticed depositions of defendant. . . ."

In *Paul Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953), plaintiff filed a civil antitrust suit on the heels of defendants' indictment based on the same allegations. Postponing discovery against defendants, the Court held (at p. 335):

"[T]he information sought to be elicited by the plaintiff in these interrogatories may well provide proof to the Government from which it may establish the criminal charges against the indicted defendants. To compel discovery under such circumstances would contravene rights guaranteed by the Fifth Amendment to the individual defendants."

To the same effect is *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952), where, during the pendency of a civil action and after oral examination of defendant had begun, a criminal indictment based on the same facts was returned. The Court granted defendant's motion terminating the deposition, stating (at p. 237):

"To require the defendant . . . to submit himself to the plaintiff for further oral examination in this civil action, wherein . . . the fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceeding now pending against him . . . would be oppressive and, at least, an indirect invasion of his constitutional rights."

Obviously, the threatened invasion of Petitioner's due process and Fifth Amendment rights is even greater

where the civil action is brought by a governmental agency rather than a private party. In the instant case the Attorney General claims he is duty-bound to refer any information relative to possible criminal conduct to other agencies, and he is apparently doing so. If there is such a duty, the California courts could not even protect Petitioner's rights (as was done in *Securities & Exch. Com'n v. Gilbert*, 79 F.R.D. 683, 687 (S.D.N.Y. 1978)), by ordering one agency not to furnish another with information procured in the course of civil discovery.

A case identical to the instant one in all critical respects is *United States v. Hankins, supra*, 565 F.2d 1344. In a nominally civil tax investigation, a certified public accountant was ordered to produce documents and present himself for oral examination. He argued that the investigation had assumed a predominantly criminal aspect. The Internal Revenue Service had made no recommendation for criminal prosecution, but unequivocally stated the accountant would probably be prosecuted should evidence of criminal conduct on his part be discovered.

On these facts the Court stated (at p. 1351):

"[T]he Government argues that Smith can be compelled to appear, take the witness stand, and either answer the questions the Government asks, or plead his Fifth Amendment protection on a question-by-question basis. . . . [W]e disagree. Were Smith the target of an investigation for robbing a bank, he would unquestionably have the right to stand on his silence. There is no significant difference between Smith as a suspected partici-

pant in a tax fraud and Smith as a suspected bank robber."

The order requiring appearance for oral examination was reversed in *Hankins*. So it should be here.

III

Petitioner, at the Focus of a Criminal Investigation, May Not Be Compelled by Law Enforcement Officers to Testify After He Has Been Advised of His Right to Remain Silent and Has Exercised That Right.

Custodial interrogation of a suspect by law enforcement officers is inherently coercive. Interrogation must cease if the suspect at any time invokes his right to remain silent (*Miranda v. Arizona,* 384 U.S. 436 (1966); *Michigan v. Mosley,* 423 U.S. 96, 104 (1975) [suspect's right to cut off questioning must be "scrupulously honored"]). As we demonstrate below, Petitioner is a suspect in an essentially criminal investigation; he has invoked his right to remain silent under custodial interrogation by law enforcement officers investigating the subject matter of the potential criminal charges against Petitioner; he cannot be forced, under the guise of civil deposition proceedings and the threat of civil and penal sanctions, to submit to further custodial interrogation.

A. The Attorney General's Investigation Is Criminal in Nature.

Despite his disclaimers, the investigation undertaken by the Attorney General in this case is patently criminal in nature:

1. The Internal Revenue Service is conducting a concurrent criminal investigation, and the Attorney General has stated his intention to turn over any evi-

dence gathered in his investigation to other criminal investigations. Indeed, in a letter to the California Supreme Court in this proceeding, the Attorney General states it is well known that Petitioner is the subject of a pending criminal proceeding. Moreover, there is evidence the Attorney General is currently distributing information obtained in this action to other law enforcement agencies to aid in criminal investigation or to induce institution of criminal proceedings by them.

2. The Attorney General's charges, though not framed in an indictment, are nevertheless clearly tantamount to criminal accusations. These charges include pilfering of Church property (California Penal Code §508; California Corporations Code §2255), misuse of Church property (California Penal Code §508; California Corporations Code §§2254-2255), sale of Church property below value (California Corporations Code §2253), destruction of Church records (California Corporations Code §2255), and diversion of Church property to personal use (California Penal Code §508; California Corporations Code §§2253, 2255). Moreover, the remedies sought by the Attorney General against Petitioner, including forfeiture of office and the right to hold future offices, are clearly penal in nature.

3. The Attorney General has indicated his own belief in the criminal nature of the proceedings by advising Petitioner of his *Miranda* rights (See *United States v. Hankins, supra,* 565 F.2d 1344, 1351). The Attorney General explained he did not want Petitioner later to complain he was not advised of his rights when the recorded interrogation is used against him in a criminal proceeding. Moreover, the Attorney General failed to furnish, as requested by the trial court,

a declaration from his Criminal Division stating that no criminal investigation was contemplated (Exh. H, p. 6).

4. As we have already shown, the Attorney General has no legitimate civil grounds for inquiring into the affairs of the Church. His only remaining purpose must be in a criminal investigation and prosecution.

The Attorney General's labelling of the action as "civil" is irrelevant. In *Mathis v. United States,* 391 U.S. 1 (1968), a person in custody for unrelated reasons was questioned as part of a "routine tax investigation." Upholding the necessity for *Miranda* warnings this Court held (at p. 4):

> "It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And . . . there was always the possibility during his investigation that his work would end up in a criminal prosecution. We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given a person in custody."

B. The Attorney General's Criminal Investigation Has Focused on Petitioner.

More than three months ago the Attorney General represented that he had conducted an investigation in 1978 which revealed "to a substantial certainty that Herbert W. Armstrong, the Pastor General of the Worldwide Church of God, and Stanley Rader, the Treasurer and General Counsel of the Church, among others, were guilty of misuse and misappropriation of millions of dollars of Church assets." (Response to Order to Show Cause Re Preliminary Injunction, p. 4, filed on or about April 4, 1979 in *Lopez, et al. v. State of California,* Los Angeles Superior Court No. C 276767.) To this very Court the Attorney General has stated, "Much of the alleged fraud in this case consists of transactions between Defendant Rader or businesses controlled by him" and the Church. (Opposition to Petition for Certiorari (No. 78-1720), p. 23).

The Attorney General's comments in and out of the courtroom leave no room for doubt Petitioner is the focus of the Attorney General's criminal investigation.

C. The Court-Ordered Deposition, Taken in the Offices of the Attorney General Under Threat of Civil and Penal Sanctions, Is a Custodial Interrogation.

The touchstone for invocation of *Miranda* rights is custodial interrogation by law enforcement officials. "The *Miranda* opinion declared that the warnings were required when the person being interrogated was

'in custody at the station or otherwise deprived of his freedom of action significant in any way.' " (*Orozco v. Texas,* 394 U.S. 324, 327 (1969).) Under controlling standards, Petitioner was subjected to custodial interrogation:

1. Petitioner was interrogated in the offices of the Attorney General, the State's highest law enforcement official. (See *Miranda v. Arizona, supra,* 384 U.S. 436, 445 ["In each [case before the Court], the defendant was questioned by police officers, detectives, or a *prosecuting attorney* in a room in which he was cut off from the outside world." (emphasis added)]; *People v. Arnold,* 66 Cal.2d 438, 448, 58 Cal.Rptr. 115, 426 P.2d 515 (1967) ["The coercive effect does not disappear because the instrumentality of interrogation is a prosecuting attorney instead of a police officer or because the locale of the query is the chamber of the prosecution rather than the policeman."].)

2. Petitioner's presence was compelled by court-issued subpoena. (See *People v. Arnold, supra,* 66 Cal.2d 438, 448 [person "authoritatively summoned" to district attorney's office for questioning]; *United States v. Bachman,* 267 F.Supp. 593 (W.D. Pa. 1966) [no custodial interrogation where defendant was not "under indictment or arrest, *subpoenaed or otherwise deprived of his freedom of action*" (emphasis added)].)[11]

[11]While it seems clear that the compulsion of court process for questioning at the Attorney General's Office thus constitutes custody for *Miranda* purposes, this is apparently an issue of first impression for this Court.

3. The Attorney General's giving of the *Miranda* warnings itself indicates the coercive nature of the interrogation. (*Beckwith v. United States,* 425 U.S. 341, 348 (1975); *United States v. Caiello,* 420 F.2d 471, 473 (2d Cir. 1969).)

In sum, the circumstances of Petitioner's interrogation were precisely those necessitating the giving of *Miranda* warnings. The Attorney General recognized this when he gave the warnings. Petitioner properly invoked his right to remain silent and to terminate questioning. The order that Petitioner once again submit to custodial interrogation is a travesty. That he should face a contempt citation for exercising his constitutional rights is an outrage.

Conclusion.

The State of California, acting in the person of the Attorney General, has completely had its way in its own courts. The State asserts a general supervisory power over the affairs of religious organizations, and the State courts enforce this power. The State employs civil proceedings as a guise for criminal discovery, invading Petitioner's constitutional rights, and the State courts see no objection to the proceedings. The State insists it may inform Petitioner of his right to remain silent and then compel him to testify, and the State courts order Petitioner to speak.

Petitioner respectfully submits that it falls to this Court to declare that the First, Fifth and Fourteenth

Amendments afford meaningful protection of individual rights. The trial court's order compelling Petitioner to testify should be reversed.

Respectfully submitted,

ALLAN BROWNE
of
ERVIN, COHEN & JESSUP

WM. MARSHALL MORGAN
of
MORGAN, WENZEL & MCNICHOLAS

DAVID M. HARNEY
of
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ELLIS J. HORVITZ
MARC J. POSTER and
ALAN G. MARTIN
of
HORVITZ, GREINES & POSTER
A Law Corporation

Counsel for Petitioners.

APPENDIX A.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

July 5, 1979

I have this day filed Order Hearing Denied.

In re: 2 Civ. No. 56345, Worldwide Church of God, Inc. vs. Superior Court, Los Angeles.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B.

California Corporations Code Section 9505:

"A nonprofit corporation which holds property subject to any public or charitable trust is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it may fail to comply with trusts which it has assumed or may depart from the general purposes for which it is formed. In case of any such failure or departure the Attorney General shall institute, in the name of the State, the proceedings necessary to correct the noncompliance or departure."

APPENDIX C.

Notice of Ruling on Motion for Order Compelling Deponent Stanely R. Rader to Answer Questions Propounded at Deposition.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. Worldwide Church of God, Inc., a California nonprofit Corporation, et al., Defendants. No. C 267-607.

PLEASE TAKE NOTICE that plaintiff's Motion for Order Compelling Deponent to Answer Questions Propounded at Deposition and Motion for Sanctions came on regularly for hearing on May 7, 1979 in Department 80 of the above entitled court, Judge Thomas T. Johnson presiding. After considering moving and opposing papers, declarations in support thereof, and hearing oral argument thereon, the court granted the motion and ordered that Stanley R. Rader make himself available on May 29, 1979 at 10:00 a.m. in the offices of the Attorney General located at 3580 Wilshire Boulevard, Suite 500, Los Angeles, California 90010 for the purposes of completing his deposition.

DATED:

GEORGE DEUKMEJIAN, Attorney General
LAWRENCE R. TAPPER
LAUREN R. BRAINARD
Deputy Attorneys General

By .....
LAUREN R. BRAINARD
Deputy Attorney General

Attorneys for Plaintiff

IN THE

Supreme Court of the United States

October Term, 1978
No. 79-205

STANLEY R. RADER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

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Textbooks

IN THE

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October Term, 1978
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STANLEY R. RADER,

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vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The instant Petition for Writ of Certiorari arises out of a civil action brought by the State of California (The People of the State of California v. Worldwide Church of God, Inc., etc., et al. Los Angeles Superior Court Case No. C 267607).[1] The purpose of that action is to protect the assets of three nonprofit charitable corporations, one of which is a church, from fraudulent misappropriation for the private benefit of the persons in control thereof. The action seeks an accounting from the defendants, one of whom is petitioner Rader, for their misappropriation of charitable assets, and any further equitable relief shown to be warranted by the accounting. It was brought by the Attorney General of the State of California as the only party

[1] A copy of the Second Amended Complaint appears as Appendix A hereto.

other than the accused wrongdoers having the legal standing under California law to do so. (*See Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750.)

A receiver was appointed ex parte on January 2, 1979, upon an application and a showing of good cause by plaintiff State of California. That appointment was confirmed by order dated January 19, 1979, after a three-day evidentiary hearing concluded on January 12, 1979. At the January 10-12 hearing, petitioner Rader testified to numerous self-dealing transactions between himself and the three charitable corporations. Among other things, Mr. Rader admitted that he has a lucrative employment contract with defendant Worldwide Church of God, Inc.; that he is an officer and director/trustee of each of the three nonprofit corporate defendants; that he holds title to a house in Tucson, Arizona, which has been bought and paid for with Church funds; that he had taken title to a house in Beverly Hills which was bought and later maintained to a large extent with Church funds, and which he sold in 1978 for $1.8 million, pocketing the proceeds; that he had organized an advertising agency (Worldwide Advertising, Inc.) to handle the purchase of television and radio time for the three charitable corporate defendants; that he had formed a partnership called Mid-Atlantic Leasing which purchased aircraft and then leased them to the Church at a profit; and that the law firm with which he is associated (Rader, Helge and Gerson), and the accounting firm that he had

organized (defendant Rader, Cornwall, Kessler and Palazzo), handled the legal and accounting work for the three corporate defendants.

The foregoing, in conjunction with other information obtained by the office of the Attorney General, underscored the need to inquire into Mr. Rader's financial and other ties to the three nonprofit corporate defendants. Consequently, on January 22, 1979, the Superior Court ordered that petitioner Rader give his deposition on January 31, 1979, in accordance with a notice of deposition previously served and filed by plaintiff State of California. Mr. Rader failed to appear for the taking of his deposition as ordered. At a hearing on March 21, 1979, the Superior Court ordered Mr. Rader's deposition to take place on March 27, 1979, in the office of the Attorney General. By stipulation of the parties, that date was continued one week to April 3, 1979, at 9:30 a.m.

Mr. Rader's deposition commenced at approximately 10:30 a.m. on April 3, 1979. (It was delayed because Mr. Rader refused to appear for his deposition until a hearing in court, scheduled by Mr. Rader's counsel, had been dispensed with.) Mr. Rader refused to answer, on the advice of counsel, virtually every question put to him during this phase of the deposition. Breaking for lunch at 12:00 noon, Mr. Rader was to return at 1:00 p.m. to resume the deposition. At 1:35 p.m., however, counsel for Mr. Rader, Allan Browne, telephoned the office of the Attorney General and stated that he and his client had decided to apply to the

trial court for an Ex Parte Temporary Restraining Order and/or Protective Order. That oral motion was found to be without justification and was denied.

The deposition was resumed at 3:45 p.m. on April 3, and Mr. Rader again refused to answer, without substantial justification, a myriad of questions.[2] The deposition was adjourned for the evening at 5:00 p.m.

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[2]Among those questions which Mr. Rader refused to answer are the following:

1. In what year did you have your first contact with the church?
2. Are you an employee of Ambassador College?
3. Do you have access to records maintained by the church in Pasadena?
4. Do you have access to records maintained by the college in Pasadena?
5. As a trustee/director of the foundation do you have access to records maintained by the foundation in Pasadena?
6. Mr. Rader, how many directors/trustees does the church have on its board?
7. Will you name who the other directors are, please?
8. How many directors does Ambassador College presently have?
9. Mr. Rader, how often does the Board of Directors/Trustees meet for the church?
10. Does the Board of Directors maintain minutes as regards their meetings in the church?
11. When did you first meet Herbert W. Armstrong?
12. Can you tell me what the total receipts were for the church in 1978?
13. Do you know approximately how much the receipts were in 1978?
14. Do you know what the expenses were for the church in the year 1978?
15. Do you know whether expenses exceeded income?
16. Mr. Rader, did the church suffer a deficit in 1976-77?
17. Mr. Rader, did the church spend more money than it took in in the year 1976-77?
18. Is Worldwide Church of God a client of Worldwide Advertising, Inc.?
19. Was Ambassador College a client of Worldwide Advertising, Inc.?
20. Was the Ambassador International Cultural Foundation a client of Worldwide Advertising, Inc.?

The deposition resumed at approximately 9:45 a.m. on April 4, 1979. Mr. Rader was read the *Miranda* warning, advising him of his rights regarding self-incrimination. The purpose of giving this admonition, as was stated at the time, was to ensure that Mr. Rader understood that the deposition transcript would be a public document when lodged with the court, and would, therefore, be available to any criminal prosecutorial agency. Since the Attorney General had learned that the Internal Revenue Service was conducting a criminal investigation of respondent Rader, the admonition was given out of an abundance of caution. Mr. Rader was further informed that the present proceedings by the Attorney General are civil in nature and that no criminal investigation or proceeding has been initiated or is pending in this office. After conference with his counsel Mr. Rader stated he would not go forward with the deposition.

A motion to compel Mr. Rader's deposition was filed and set for hearing on April 27, 1979. After argument had commenced on April 27, the matter was continued to May 7, 1979, so that Mr. Rader could respond to the court's inquiry of whether he intended to invoke the right against self-incrimination as to every question asked him concerning his handling

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21. Did the Worldwide Advertising, Inc. entity perform services in any capacity for the Worldwide Church of God in 1970?
22. Did Worldwide Advertising, Inc. during the years that you were an officer, director or stockholder thereof contract to provide services to Worldwide Church of God?
23. Did Mid-Atlantic Leasing lease an airplane or airplanes to Worldwide Church of God?
24. Was it formed for the purpose of leasing airplanes to Worldwide Church of God?
25. Were you during the year 1971 a partner in an entity known as Mid-Atlantic Leasing?

and use of the assets of the three charitable corporate defendants; if so, the setting of a deposition would seem to be an idle act. The court further requested that the office of the Attorney General file a brief declaration, reiterating assertions made in open court, that this office had no criminal proceedings or investigations pending which had focused on Mr. Rader as a suspect. Such a declaration was filed with the court.

On May 7, 1979, the trial court ruled that Mr. Rader had every right to invoke the privilege against self-incrimination but that he must do so on a question by question basis; that Mr. Rader did not have the right to refuse to testify entirely because that right belongs only to a criminal defendant. The court further found that the questions which Mr. Rader had refused to answer were proper subjects of discovery and that no ecclesiastic privilege pertained thereto. The court therefore ordered Mr. Rader to recommence his deposition on May 29, 1979, at 10:00 a.m. in the office of the Attorney General.

On May 25, 1979, Mr. Rader's attorney, Allan Browne, telephoned the office of the Attorney General and stated that Mr. Rader would not appear for his deposition as ordered because there was pending before the California Court of Appeal a request for an immediate stay and a Petition for a Writ of Prohibition/ Mandate. At approximately 3:00 p.m. on May 25, 1979, the Court of Appeal denied that application and petition.[3] Despite that denial, Mr. Rader still refused to appear for his deposition on May 29th. Consequently, a motion to have Mr. Rader held in contempt and

[3]Rader's subsequent Petition for Hearing in the California Supreme Court was denied on July 5, 1979.

for the setting of a new date for Mr. Rader's deposition was filed, and was heard on August 7, 1979. While not holding him in contempt at that time, the trial court once again ruled that Mr. Rader must give his deposition. Upon being advised by his counsel that Mr. Rader was out of the country but would be back in the United States on August 25th, the court ordered that Mr. Rader resume his deposition on August 27, 1979, at 10:00 a.m. in the office of the Attorney General.

Mr. Rader failed to appear for his deposition on August 27, 1979; instead, he has filed a motion to continue the taking of his deposition to some future date. This motion is set for hearing on September 21, 1979.

ARGUMENT

I

The Investigation of the Secular Financial Affairs of the Corporate Defendants in Civil Action No. C 267607 Does Not Infringe Upon First Amendment Rights

Petitioner's first argument is that he cannot be compelled to testify (*i.e.*, give a deposition) in Civil Action No. C 267607, because (1) the state's investigation and action for an accounting are unconstitutional under the First Amendment, and (2) it would be a violation of the Due Process Clause to compel him to testify in proceedings which exceed the constitutional power of the state.

These First Amendment arguments are a repetition of the arguments presented by this petitioner and the other defendants in the companion case of *Worldwide Church of God v. State of California,* No. 78-1720, now pending before this Court on Petition for Writ of Certiorari. These arguments have been dealt with at length by respondent in its Opposition to that petition filed on June 26, 1979.[4] Briefly, respondent's position is as follows:

A. Pursuant to Ancient and Settled Legal Principles Religious Organizations Hold Their Assets in Trust for Their Religious Purposes, Which Are Also Charitable Purposes, and the State Attorneys General Are Charged With the Responsibility of Enforcing and Supervising Charitable Trusts

The courts of California have always held without exception that the secular affairs of church corporations are subject to supervision by the Attorney General

[4]Respondent hereby requests that this Court take judicial notice of its Brief in Opposition to Petition for Certiorari, filed on June 26, 1979, in Case No. 78-1720.

and the courts. (*In re Metropolitan Baptist Church of Richmond, Inc.* (1975) 48 Cal.App.3d 850; *Wheelock v. First Presbyterian Church* (1897) 119 Cal. 477.) In general throughout the United States, religious purposes are regarded as charitable and trustee for purposes are regarded as charitable and trusts for (See IV Scott on Trusts (3d ed.) § 371, p. 2880.)[5]

The state attorneys general are charged with such duties of enforcement and supervision because the fulfillment of the purposes of charitable, including religious, organizations is thought to be of general benefit to society as a whole. In that sense, such entities are trustees of their assets for the public benefit and hold such assets in trust for the religious or charitable purposes set forth in their governing documents. (*Pacific Home v. County of Los Angeles* (1951) 41 Cal.2d 844, at 851-852; *In re Metropolitan Baptist Church of Richmond, Inc., supra,* at 857.) Any diversion of such funds is a breach of trust. (*In re Metropolitan Baptist Church of Richmond, Inc., supra,* at 857; *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, at 759-760.) In California and in many other states, the Attorney General is the only party other than corporate directors or trustees (who in this case are the very persons accused of wrongdoing) who has standing to enforce a charitable trust. (*Holt v. College of Osteopathic Physicians & Surgeons, supra,* at 755-757; IV Scott on Trusts (3d ed.) § 391, p. 3006.) While the

[5]Indeed, this Court has recognized that the activities of religious organizations are of general benefit to society as a whole, and has on that basis held that a state grant of property tax exemptions to churches does not violate the establishment clause of the First Amendment. (*Walz v. Tax Commission* (1970) 397 U.S. 664, 680.)

public as a whole is the beneficiary of all charitable trusts, members of the public (including in this case members of the Worldwide Church of God) have no clear authority to bring court actions to enforce a charitable trust.

The supervision of charity by state attorneys general goes back more than 200 years. The attorneys general and chancery courts of England had such supervisory powers prior even to the enactment of the English Statute of Charitable Uses in 1601. (Stats. 43 Elizabeth I, c. 4; IV Scott on Trusts (3d ed.) § 368.1, p. 2858, § 391, p. 3002.)

B. The First Amendment Does Not Excuse the Perpetration of Fiscal Fraud in the Name of Religion, nor Does It Shield the Perpetrators From Corrective Action in the Courts

Petitioner argues that the Attorney General's efforts in this action to uncover and correct misappropriation of charitable funds somehow impede impermissibly the free exercise of religion. The premise appears to be that the courts will never be able to distinguish successfully between the financial and business affairs of a church and its charitable trust on the one hand and its spiritual and ecclesiastical affairs on the other. The essence of such an argument is that the business and financial activities of a church at every level are inextricably intertwined with its religious activities and the fulfillment of its religious purposes, that it is impossible for the state to separate the secular activities of the church from its religious activities, and that

state supervision of the church's secular activities is therefore unconstitutional.

That assertion notwithstanding, however, the law is not such an ass as to be unable to distinguish between secular matters (including fiscal fraud) and ecclesiastical belief. In *Cantwell v. Connecticut* (1940) 310 U.S. 296, while invalidating a conviction for alleged unlawful solicitation of funds for religious purposes, this Court nevertheless made it plain that "[n]othing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." (310 U.S. at 306.) This Court has also made it clear that the rule prohibiting "entanglement" between church and state does not apply to cases involving "fraud, collusion, or arbitrariness." (See, *e.g., Gonzales v. Roman Catholic Archbishop* (1929) 280 U.S. 1, 16; *Maryland and Virginia Eldership v. Church of God* (1970) 396 U.S. 367, concurring opinion of Brennan, J., fn. 3, at 369.)

C. The Purpose and Effect of the Attorney General's Enforcement Action Is to Halt and Correct Fraudulent Diversion of Charitable Assets, Not to Interfere With Any Religious Doctrine or Practice

The Second Amended Complaint in this action alleges that the individual defendants have fraudulently diverted assets of the three nonprofit charitable corporations to their own benefit. These defendants, Mr. Rader a principal among them, make no claim that fraudulent diversion is permitted by church doctrine or practice,

and of course any such claim would of itself be fraudulent. Thus, the purpose of this lawsuit, to halt and correct fraudulent diversion, does not impact in any way upon any religious doctrine or practice. Therefore, cases involving government regulations or actions which adversely affect religious doctrine or practice are not in point.[6]

Obviously, California, as well as other states, has a strong policy forbidding fraudulent diversion of corporate funds, whether or not the affected corporation is a church. This is a neutral policy of law and is applicable in the same manner to religious corporations as it is to secular ones. (See *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440 at 449.)

Much of the alleged fraud in this case consists of transactions between Mr. Rader or businesses controlled by him and the three nonprofit charitable corporations.[7] Under these circumstances the records of the questioned transactions are either in the possession of Mr. Rader or the charities. With few exceptions, there are no other sources for this evidence. Thus, Mr. Rader's deposition is required both to discharge his obligation to account for his use of charitable

[6]Even governmental action which does have some adverse impact upon religious practice will not violate the First Amendment if its purpose and primary effect is to advance a rational and legitimate secular governmental purpose. (See *Johnson v. Robison* (1973) 415 U.S. 361, 384; *Gillette v. United States* (1971) 401 U.S. 437, 462; *Braunfeld v. Brown* (1961) 366 U.S. 599, 607.)

[7]Such self-dealing transactions by fiduciaries are absolutely prohibited by California law. (See California Civil Code Sections 2228-2235.) This prohibition applies not only to trustees of charitable trusts but to officers and directors of charitable corporations as well. (See, e.g., *People of the State of California v. Larkin* (N.D. Cal. 1976) 413 F.Supp. 978, 981-82; *Lynch v. John M. Redfield Foundation* (1970) 9 Cal.App.3d 293, 301.)

assets and to determine the true nature and extent of these questionable transactions. Respondent submits that Mr. Rader cannot be allowed to hide his obligation to account behind the First Amendment.

II

The State Court Order Requiring Petitioner to Attend His Deposition and Give Testimony Does Not Violate His Rights Under the Fifth Amendment

Petitioner's primary argument is that to compel him to testify at his deposition in this civil action would violate his rights under the Fifth Amendment. Petitioner contends that this is so because (1) there are pending criminal investigations of petitioner by other law enforcement agencies, and (2) the investigation undertaken by the Attorney General is itself criminal in nature, has focused on petitioner, and that his deposition is a "custodial interrogation." Petitioner therefore concludes that the *Miranda* warning given him at his deposition was necessary and proper, and that he now has a right to remain silent.

Respondent submits that these arguments are devoid of merit.

A. The Privilege Against Self-Incrimination and the Right to Remain Silent

Both the Fifth Amendment to the Constitution of the United States and the Constitution of the State of California (Art. I, § 15) declare, in nearly identical language, that no person shall "be compelled in any criminal case to be a witness against himself." Since at least 1892 (*Counselman v. Hitchcock* (1892) 142 U.S. 547, 562) that language has been construed to embody two distinct privileges: (1) the privilege

against self-incrimination, that is, the right not to disclose incriminating matters, which is available to every natural person in both civil and criminal proceedings (*In re Gault* (1967) 387 U.S. 1, 49), and (2) the right to remain silent that is, the right not to be called as a witness and not to testify, which is available only to a defendant in a criminal proceeding (*Boyd v. United States* (1886) 116 U.S. 616) or to one who is the object of custodial interrogation (*Miranda v. Arizona* (1966) 384 U.S. 436.)

The federal courts have been uniform in upholding this distinction; that although a person cannot be compelled to give self-incriminating testimony, a witness other than an accused must, if properly summoned, appear and be sworn. The privilege against self-incrimination is available to him only as a witness, and cannot be extended so as to excuse him from appearing. The proper course is for him to wait until the propounding to him of a question which tends to incriminate him, and then claim the privilege and decline to answer. (*State v. Parham* (1974 Iowa) 220 N.W.2d 623, 626; 81 Am.Jur.2d, Witnesses, § 30, *et seq.*, § 36.)

> "No person other than an accused in a criminal prosecution has any blanket right to refuse to testify. Accordingly, all other persons claiming the privilege against self-incrimination must claim the privilege a question at a time in response to particular queries." (C. Antieau, Modern Constitutional Law (1969) § 2:28, vol. 1, pp. 186-187.)

In *Garner v. United States* (1974) 501 F.2d 228 (aff'd. 424 U.S. 648), the defendant in a criminal prosecution for violation of various federal gambling statutes contended on appeal that the introduction into evidence of his income tax returns (which stated that

he derived income from gambling and wagering) violated his privilege against self-incrimination. The Court of Appeal rejected this contention, holding that at the time the defendant had made the statements on his tax return, he was a witness and should have asserted his privilege at that time. The court stated:

> "At issue is the nature of the privilege against self-incrimination guaranteed by the Fifth Amendment. . . . The privilege is now available to a potential criminal defendant well before proceedings actually begin as well as to a witness in criminal, civil, grand jury, or legislative proceedings. However, the scope of a defendant's privilege is greater than that he would enjoy if he were only a witness. Not only may a defendant refuse to answer questions but he is also entitled not to be called as a witness at his trial. The witness, on the other hand, has no right to be immune from inquiries though he may decline to respond to them by claiming his privilege. This differing treatment results from the nature of the privilege. *See* C. McCormick, Evidence §§ 130, 136 (2d, 1972)." (Citations omitted.) (*Garner v. United States, supra*, at 237-238. See also *Alston v. United States* (D.C. App. 1978) 383 A.2d 307, 313.)

In California, these two separate privileges have been codified in California Evidence Code sections 930 and 940.[8] In *People v. Welchel* (1967) 255 Cal.App.2d

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[8]California Evidence Code sections 930 and 940 provide as follows: Section 930 "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify." Section 940 "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

455, the California Court of Appeal addressed itself to the distinction between the two privileges, stating:

> "The federal and state Constitutions in identical language declare that no person shall 'be compelled in a criminal case to be a witness against himself.' [Citations.] In California, by statutory declaration, to the extent conferred by either of these constitutional provisions, a defendant in a criminal case has the privilege not to be called as a witness and not to testify (Evid. Code § 930); and every person has the privilege to refuse to disclose any matter that may tend to incriminate him. (Evid. Code § 940.) The constitutional provisions generally have been described as conferring a right to remain silent. They are exceptions to the general rule that no person may refuse to testify as a witness. (Evid. Code § 911.) The privilege not to be called as a witness may be asserted only by a defendant in a criminal proceeding. [Citations.] On the other hand, the privilege not to disclose any incriminating matter may be asserted by any person either in a civil or criminal proceeding [Citations] or otherwise." (255 Cal.App.2d at 460. See also *People v. Frohner* (1976) 65 Cal.App.3d 94, 105; *People v. Shipe* (1975) 49 Cal.App.3d 343, 349; *People v. Chandler* (1971) 17 Cal.App.3d 798, 804-805.)

B. Petitioner's Contentions

In refusing to sit for his deposition, petitioner Rader seeks to invoke the right of a defendant in a criminal proceeding to remain silent. Petitioner first argues that he should be accorded that right because, he alleges, he is the object of pending criminal investigations by other prosecutorial agencies.

Respondent submits that even if true, the fact that other prosecutorial agencies may be conducting *investigations* of petitioner which are criminal in nature is irrelevant. Unlike the defendants in the cases cited in support of his position, petitioner Rader is not under any criminal *indictment*; thus, he is not the object of any criminal proceedings. Nor is Rader's position in the instant case equivalent to that of the accountant Smith in the cited case of *United States v. Hankins* (5th Cir. 1978) 565 F.2d 1344. In holding that Smith had a right not to testify, the court in *Hankins* took pains to point out that he had no potential liability. Smith was not the target of the civil tax investigation. His *only* potential liability was criminal. (*United States v. Hankins, supra,* at 1351.)

Petitioner also argues that he should be accorded the right to remain silent because, he alleges, the Attorney General's investigation is itself criminal in nature, that it has "focused" on petitioner, and that his deposition is a "custodial interrogation" in the *Miranda* sense.

As previously set forth, the action for an accounting underlying the instant petition is civil in nature. The investigation being conducted by the California Attorney General in connection with that lawsuit is of alleged violations of civil law. The Attorney General seeks to enforce the rights of the public, as the ultimate beneficiaries of charitable trusts, against the trustees thereof for any breach by them of their fiduciary duties. In attempting to conduct discovery in this matter, the state seeks nothing more than to depose petitioner Rader, who is an officer, director and/or trustee of the charities here involved.

Petitioner Rader has not been and is not now the focus of any criminal investigation by the California

Attorney General. In *Miranda v. Arizona* (1966) 384 U.S. 436, this Court specifically defined "focus" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (384 U.S. at 444. See also *Beckwith v. United States* (1976) 425 U.S. 341, 347.) That is just not the situation here.

Finally, petitioner argues that the taking of his deposition in this civil case is equivalent to "custodial interrogation" within the scope of this Court's holding in *Miranda v. Arizona, supra.* A recent case rejecting a similar contention is *Beckwith v. United States* (1976) 425 U.S. 341. In that case, prior to his trial on a charge of attempted federal income tax evasion, the defendant moved to suppress statements which he had made to special agents of the Internal Revenue Service at a noncustodial interview that had been conducted in a private home. The defendant argued that the government's investigation was criminal in nature, that it had focused on him, and that he was therefore entitled to and should have been given the warnings mandated by *Miranda.* The District Court rejected the defendant's contention, finding that there was no evidence of any custodial circumstances compelling the *Miranda* warnings; the Court of Appeals affirmed. This Court also affirmed, holding that (1) the Internal Revenue Service agents were not required to give the defendant a *Miranda* warning in their interview of him because he was not in custody; and (2) the statements made by the defendant in this noncustodial interview were admissible against him, even though he was the "focus" of a criminal investigation for tax fraud, because the *Miranda* requirements apply

only with regard to "custodial interrogation," that is, questioning initiated by law enforcement officers *after* a person is taken into custody or otherwise deprived of his freedom of action in a significant way. (*Beckwith v. United States, supra,* 344-347.)

In the instant case, petitioner Rader is a licensed attorney and a certified public accountant. He is well represented by attorneys in this matter. In this context, his assertion that the taking of his deposition is equivalent to a custodial interrogation in the *Miranda* sense is ludicrous. Petitioner is a witness in a civil proceeding; his only proper course is to raise his privilege against self-incrimination, if necessary, on a question-by-question basis at his deposition.

Conclusion

The purpose and effect of the investigation and lawsuit being prosecuted by the State of California in Civil Action No. C 267607 is to prevent and correct fiscal fraud in the administration of three nonprofit charitable corporations, one of which is a church. Fiscal fraud is not a part of any religious doctrine or practice, and its prevention and correction cannot interfere with such doctrine or practice.

Further, the state's Action is civil in nature, not criminal, and petitioner is not the focus of any criminal investigation by the State of California. Petitioner has not been charged with any crime; he is not a criminal defendant. Thus, while petitioner clearly may assert the privilege against self-incrimination with respect to any particular question the answer to which may tend to incriminate him, he cannot assert as a bar to giving his deposition the right of a criminal defendant to remain silent.

For the foregoing reasons, respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General,

LAWRENCE R. TAPPER,
JAMES M. CORDI,
WILLIAM S. ABBEY,
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APPENDIX A.

Second Amended Complaint for (a) Accounting, (b) Removal of Trustees, (c) Equitable Relief, (d) Appointment of a Receiver, and (e) Injunctive and Other Appropriate Relief.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. Worldwide Church of God, Inc., a California Nonprofit Corporation, Ambassador College, Inc. a California Nonprofit Corporation, Ambassador International Cultural Foundation, Inc., a California Nonprofit Corporation, Worldwide Advertising, Inc., a California Corporation, Gateway Publishing, Inc., a California Corporation, Mid-Atlantic Leasing, a partnership, Excelsior Leasing, a Corporation, Environmental Plastics, Inc., a Texas Corporation qualified to do business in California, Herbert W. Armstrong, Stanley R. Rader, Osamu Gotoh, Robert Kuhn, Raymond L. Wright, Henry Cornwall, Ralph Helge, the Accounting Firm of Rader, Cornwall, Kessler and Palazzo, and Does 1 through 100, Inclusive, Defendants. No. C 267-607.

AS A FIRST CAUSE OF ACTION FOR ACCOUNTING, PLAINTIFF ALLEGES:

1. George Deukmejian is the duly constituted Attorney General of the State of California, and as such is charged with the supervision of all charitable organizations within this state and with the supervision of trustees and fiduciaries who hold or control property in trust for charitable and eleemosynary purposes. This action was originally brought by and on behalf of the People of the State of California on the relation

of individuals who had been granted leave to sue by the Attorney General. Its purpose is to correct the abuse of charitable trusts. The six individually designated relators have since withdrawn, and sole responsibility for the action now rests with the Attorney General.

2. Defendant Worldwide Church of God, Inc. (hereinafter the Church) is a California corporation created and existing under the California general nonprofit corporation law. Its principal place of business is in the County of Los Angeles, California. The Church was organized exclusively for charitable and religious purposes, and all of its assets are dedicated irrevocably to those purposes such as are set forth in its articles of incorporation a copy of which is attached hereto and incorporated herein as Exhibit 1. At all times since its incorporation in 1934 it has been exempted from taxation by the State of California under Revenue and Taxation Code section 23701(d), and what is now Article XIII, section 4(b) of the California Constitution.

3. Defendant Ambassador College, Inc. (hereinafter the College), is a California corporation created and existing under the California general nonprofit corporation law. Its principal place of business is in the County of Los Angeles, California. The College was organized exclusively for educational (charitable) purposes, and all of its assets are dedicated irrevocably to those purposes such as are set forth in its articles of incorporation, a copy of which is attached hereto and incorporated herein as Exhibit 2. At all times since its incorporation in April 1951 it has been exempted from taxation by the State of California under Revenue and Taxation Code section 23701(d), and what is

now Article XIII, section 4(b) of the California Constitution.

4. Defendant Ambassador International Cultural Foundation, Inc. (hereinafter Foundation), is a California corporation created and existing under the California general nonprofit corporation law. Its principal place of business is in the County of Los Angeles, California. The Foundation was organized exclusively for cultural (charitable) purposes, and all of its assets are dedicated irrevocably to those purposes, such as are set forth in its articles of incorporation, a copy of which is attached hereto and incorporated herein as Exhibit 3. At all times since its incorporation in March 1975 the Foundation has been exempted from taxation by the State of California under Revenue and Taxation Code section 23701(d), and what is now Article XIII, section 4(b) of the California Constitution.

5. By reason of the exemption from tax of the property of the Church and the College and the Foundation, as above alleged; and also by reason of the fact that all donations and contributions to the Church, the College and the Foundation have been deductible from income by the donors and contributors for purposes of computing their federal and state income taxes; plaintiff is informed and believes, and therefore alleges, that the Church, the College and the Foundation have enjoyed substantial public subsidies amounting over the last ten years to more than $150,000,000.

6. Defendants Stanley R. Rader, Herbert W. Armstrong, Ralph Helge, Henry Cornwall, Osamu Gotoh, Robert Kuhn, Raymond L. Wright, and Does 1 through 50 are and at all relevant times have been either officers, directors, or full-time employees of one or

more of the above-named charitable entities (hereinafter referred to collectively as the Church, the College and the Foundation) or one or more of the following named for-profit defendants, or both. All of the acts herein complained of have been done with their knowledge and complicity, and under their supervision. In addition, each individual defendant is legally responsible for the act and omissions of his co-trustees.

7. Plaintiff is informed and believes, and on that basis alleges, that defendants Worldwide Advertising, Inc. and Gateway Publishing, Inc. are California corporations; that Does 51 through 100 are corporations, partnerships or other business entities; that Environmental Plastics, Inc. is a Texas corporation qualified to do business in California; that Rader, Cornwall, Kessler and Palazzo is an accounting firm formed either as a California professional corporation or a partnership; that Mid-Atlantic Leasing is a corporation or partnership; that Excelsior Leasing is a Pennsylvania corporation qualified to do business in California; that the above are hereinafter referred to collectively as the for-profit defendants. Plaintiff is informed and believes, and on that basis alleges, that each of the for-profit defendants is owned or controlled by one or more of the officers or directors of the Church, the College or the Foundation, including particularly the defendant Stanley R. Rader; that funds and property contributed to the charitable entities are freely transferred among them and the for-profit defendants; that financial and business records of the charitable entities have been and continue to be in the custody and possession of the for-profit defendants; and that the unity of record ownership and actual control among the charitable entities and the for-profit defendants,

and the course of dealing between them, has been for many years and is now such that for all purposes of this accounting, it would be unjust and inequitable to recognize any separate existence among them at all. The exact status and constitution of the for-profit defendants, and their precise relationship with the charitable entities, are matters not known to plaintiff at this time, but are peculiarly within the knowledge of the defendants; and plaintiff will ask leave of the Court to amend this Complaint to show their true status and constitution, and the exact nature of their relations with the charitable entities when the same have been ascertained.

8. The true names and capacities of defendants Doe (whether individual, corporate, associate or otherwise) and the true nature of their relationship with the other defendants, is presently unknown to the plaintiff, but is peculiarly within the knowledge of the individual named defendants. Plaintiff will ask leave of the Court to amend this complaint to show the true names and capacities of the defendants Doe, and the true name of their relationship, when the same have been ascertained.

9. Defendants HERBERT W. ARMSTRONG and STANLEY R. RADER are and all times pertinent to this Complaint have been in full and complete control of the Church, the College, the Foundation, and all of their affairs. HERBERT W. ARMSTRONG is and has been Pastor General of the Church ever since its formation, and has been an officer and director of the College and Foundation as well as the Church at all times since their formation. Defendant Stanley R. Rader has acted as general counsel and chief adviser of the three entities for the past fifteen years, and

for the past four years has acted and is presently acting in at least the following capacities: as director, executive vice-president, executive director, vice-president for financial affairs, secretary-treasurer and general counsel.

10. The Church, the College and the Foundation, as well as the individual named defendants (including Does 1-50), hold and are responsible for the assets of the three charitable entities, as trustees, subject to supervision by the Attorney General and ultimately by this court. The ultimate beneficiary in each instance is the public which benefits generally from all charitable endeavors. None of the defendants has or may legally have any proprietary interest in the assets and properties of the Church, the College or the Foundation, nor in their books and records.

11. The Church, the College, the Foundation and the individual named defendants as their officers and directors are required by law to account to the public and this court for all funds received, expended, or held by the three entities. Notwithstanding this duty to account, and repeated requests by plaintiff and members of the Church, these defendants have failed and refused, and still fail and refuse, to make any such accounting at all.

12. The need for an accounting by defendants in this case is particularly acute for each of the following reasons:

(a) Plaintiff is informed and believes, and on that basis alleges, that for a period exceeding ten years the individual and for-profit defendants (including Does 1-100), acting in concert with and under the direction of defendants Armstrong and Rader, have been and are siphoning off and

diverting to their own use and benefit assets and properties of the Church, the College and the Foundation, on a massive scale increasing in the last several years to millions of dollars per year, and causing substantial fiscal deficits in their operation.

(b) Although much of the funding for the Church, the College and the Foundation is generated through contributions and other payments and tax subsidies provided by the public as a whole, a major source of funds for the Church has come from tithing of its members. As Pastor General of the Worldwide Church of God, and as the self-proclaimed Ambassador of God on earth, Herbert W. Armstrong has directed all members of the Church to contribute the first ten percent (10%) of their gross income. Failure to do so, according to Armstrong's published disseminations to the members, is ". . . STEALING from GOD . . . and is SIN, which will cost you your SALVATION." By reason of such representations and exhortations, a special fiduciary relationship has been created in which Mr. Armstrong, Mr. Rader and the other individual defendants owe the highest duty of accountability, not merely to the general public which is interested in preventing fraud, but also the members and former members who have not only given their money but have also placed their trust in the defendants to use it strictly for God's work.

(c) In the solicitation of funds, defendant Armstrong has not always been candid. From time to time throughout the past ten years the Church has sent out special and urgent requests for con-

tributions to be made at great personal sacrifices to the donors. Attached hereto and incorporated herein as Exhibit 4 is one such request dated March 30, 1970. The letter speaks of a "tight money situation" requiring cutbacks in Church salaries, publications and operating expenses in all departments of the "Work;" it states that "God's Work" needs "IMMEDIATE CASH"; and on the suggestion of ". . . Mr. Rader, our legal counsel and financial adviser," members are asked to borrow whatever they can, so long as they do not lower the income for the "Work" through the rest of the year. The true nature of the alleged fiscal emergency is exemplified by two purchase orders attached hereto and incorporated herein as Exhibit 5. Mr. Armstrong's letter of March 30, 1970, failed to disclose, among other pertinent facts, the purchase for his Pasadena residence of a $6,090.00 crystal candelabra on January 2, 1970, and French porcelain vases for $2,079.00 on March 31, 1970.

(d) In addition to the first 10% tithe (for God), and a second 10% tithe (to provide for the member's expenses at the annual Festivals), there is a third tithe imposed by the Church on its members consisting of ten percent (10%) of their gross income every third year. Throughout the past ten years this contribution has been expressly solicited as a special fund for widows and orphans. A trust has been imposed on these funds which requires that they be used only for such purposes. Plaintiff is informed and believes and thereupon alleges that an accounting has never been rendered of the receipt and disposition

of these funds, and that they have been diverted to purposes other than those for which they were solicited and donated.

13. Because the named individual defendants are now, and at all times pertinent to this action have been in full, effective and exclusive control of all the property, assets, records and administrative facilities of the Church, the College and the Foundation; and because they have consistently denied and still presently deny meaningful access to such records by the Attorney General of the State of California, plaintiff has no alternative but to make many of the allegations of this complaint on information and belief. Plaintiff will ask leave of the Court to amend this complaint in all pertinent respects when the particular facts concerning the actions complained of have been ascertained.

AS A SECOND CAUSE OF ACTION FOR REMOVAL OF INDIVIDUAL DEFENDANTS AS TRUSTEES, AND FOR INJUNCTION, PLAINTIFF ALLEGES:

14. Paragraphs 1 through 13 of the First Cause of Action are incorporated by reference into and hereby made a part of this Second Cause of Action.

15. Plaintiff is informed and believes and thereupon alleges that defendant Herbert W. Armstrong is 86 years of age; that he has suffered a heart attack; that he no longer resides in California; and that he is not in daily control of the operations of the Church, the College or the Foundation. The exact nature and extent of his involvement and participation in the diversion of charitable funds hereinabove alleged, either at the present time or in the past, is currently unknown to plaintiff, but is peculiarly within the knowledge of the defendant Armstrong and the other defend-

ants. Plaintiff will ask leave to amend his complaint to show the true facts when the same have been ascertained.

16. Plaintiff is further informed and believes, and thereupon alleges, that for all practical purposes, the financial affairs of the Church, the College and Foundation are now and have for some time been controlled by the defendants Stanley R. Rader, Osamu Gotoh, Ralph J. Helge, Robert Kuhn, Raymond L. Wright, and Henry Cornwall.

17. In addition to his official capacities described above in paragraph 9, Rader has claimed additional power and authority since January 4, 1979 by reason of a directive purportedly issued on that day by the defendant Armstrong, a copy of which is attached herein and incorporated herein as Exhibit 6.

18. Since this action was filed in January 1979, defendants Rader and Helge have done everything within their power to deny plaintiff access, not only to the books and records of the Church, College and Foundation, but to individuals with knowledge of the operation and financial affairs of said charitable entities.

19. Plaintiff has been endeavoring since January 31, 1979, when this court first so ordered, to examine Rader under oath in deposition concerning his fiduciary relationship to the Church, College and Foundation, and the manner in which he has carried out his reponsibilities. Rader failed and refused to appear until further ordered to do so on April 3 and 4, at which time he refused to answer proper questions, and ultimately announced unilaterally that he was leaving the deposition and would not participate any further therein. A copy of the transcript of Rader's deposition is being lodged with this court in connection with plaintiff's

Motion to Compel Discovery, and is hereby incorporated by reference and made a part of this complaint.

20. By reason of each and all of their acts and omissions hereinabove related, the defendants Rader Gotoh, Kuhn, Wright, Cornwall and Helge have failed and refused to comply with the trust which they have assumed; each of them has departed and caused the Church, College and Foundation to depart from the charitable purposes he and they were bound to serve; and each of said defendants should be removed from all responsibility in connection with the Church, College and Foundation.

21. Further, plaintiff is informed and believes, and therefore alleges that the said defendants have caused the Church, College and Foundation to enter into various purported contracts of employment and other contracts with each of the said trustees, providing for compensation and reimbursement of expenses. Plaintiff alleges that all of said contracts were entered into by the Church, College and Foundation without sufficient consideration and under undue influence, and without proper corporate authority; and alleges that each of said contracts should be cancelled and determined to be null and void. A copy of the Employment Contract of Stanley R. Rader dated July 30, 1976 is attached hereto, marked Exhibit 7, and is incorporated herein by this reference.

22. Plaintiff further alleges that each of the defendants Rader, Gotoh, Kuhn, Wright, Cornwall and Helge should be perpetually enjoined and restrained from serving as officers or directors, or any other capacity, with respect to the Church, College or Foundation or any other California charitable or trust or organization.

AS A THIRD CAUSE OF ACTION FOR ORDERS REQUIRING COMPLIANCE BY THE CHURCH, COLLEGE AND FOUNDATION WITH CALIFORNIA LAW PERTAINING TO NONPROFIT CORPORATIONS ORGANIZED FOR CHARITABLE PURPOSES, OR FOR OTHER APPROPRIATE RELIEF, PLAINTIFF ALLEGES:

23. Paragraphs 1 through 13 of the First Cause of action, and paragraphs 15 through 22 of the Second Cause of Action, are hereby incorporated by reference into and hereby made a part of this Third Cause of Action.

24. By virtue of the facts hereinabove alleged, the defendant charitable entities have claimed the benefits of incorporation as nonprofit corporations organized for charitable purposes under the laws of the State of California which beneifits include among others the substantial tax subsidies and exemptions hereinabove referred to; but the said charitable entities have failed in numerous respects to comply their obligations under said laws, as follows:

(a) Claiming that their organization is "hierarchical," the charitable entities have never been subject to the governance of any board of directors, board of trustees or other independent body, authorized and empowered to supervise and preserve charitable funds collected and held by them as required by law;

(b) Notwithstanding that the bylaws adopted by the charitable entities called for a vote of the members on numerous matters of importance, including amendment to the articles and bylaws, disfellowshipment of members and other matters, no member of said charitable entities has ever

voted or been permitted or requested to vote on any matter and no vote of the members has ever been held on any subject. In this connection, plaintiff is informed and believes, and thereupon alleges, that although statements were filed with the Secretary of State reflecting a purported vote of the membership on certain amendments to articles of incorporation of the defendant Church, no such vote and no such election was ever held, as the defendants herein are well aware.

(c) The defendants have taken the position that their bylaws may be altered or entirely disregarded whenever it suits their purposes, since said bylaws are "viewed only as guidelines, which are subject to spiritual interpretations (by defendants) and are subordinate to the higher law of God." A copy of the Declaration of defendant Helge, dated January 11, 1979 and filed with this court on or about January 12, 1979, is attached hereto as Exhibit 8 and is hereby incorporated by reference and made a part of this complaint.

(d) Claiming that all decisions of the defendants Armstrong and Rader are "religious" or "spiritual," including all decisions affecting the disposition of charitable trust funds collected and held by the Church, College and Foundation, defendants have taken the position that all of their financial decisions and expenditures, including the disposition of funds for their personal use and benefit, is protected and exempted from review or scrutiny by anyone, including this court, by virtue of the First Amendment; and have thereby claimed and continue to claim that they are entitled to dispose of charitable funds as they please.

25. The defendants Church, College and Foundation should be required by this court to comply with their obligations under the laws of the State of California pertaining to nonprofit corporations organized for charitable purposes in all respects, including among others the following: (a) The Church, College and Foundation should be required to select a board of directors, board of trustees, or other board authorized and empowered to oversee and supervise its financial affairs (as distinguished from its ecclesiastical or spiritual affairs), in such manner as to provide reasonable assurance that the charitable trust funds collected and held by such charitable entities will be applied solely to the charitable uses to which they were donated, and will not be diverted or misapplied for the personal benefit of any individual, or for any other improper purposes; (b) The Church, College and Foundation should be required to take such steps as may be necessary or appropriate to keep and maintain proper records of their financial and business transactions, and to prepare and cause to be rendered periodic accountings of their financial and business affairs as required by law; (c) The Church, College and the Foundation should be required to take such steps as may be necessary or appropriate to prevent the dissipation of charitable trust funds in the future, and to recover such charitable trust funds as have previously been allowed by them to be dissipated or diverted by improper purposes.

26. If and to the extent the Church, College and Foundation cannot be made to comply with their legal obligations in exchange for obtaining the benefits of their status as charitable California corporations, the court should make such other orders and grant such

other relief as may be necessary or appropriate under the circumstances to preserve the charitable funds which have been accumulated by them, and which are presently entrusted to their care and custody.

AS A FOURTH CAUSE OF ACTION FOR RECEIVER, PLAINTIFF ALLEGES:

27. Paragraphs 1 through 13 of the First Cause of Action and Paragraphs 15 through 22 of the Second Cause of Action and Paragraphs 24 through 26 of the Third Cause of Action, are hereby incorporated by reference into and made a part of this Fourth Cause of Action.

28. Based on limited and sporadic statements issued by defendants to the membership of the charitable entities, plaintiff is informed and believes, and on that basis alleges, that they receive approximately $70 million per year in contributions, and that they have a net worth of approximately $80 million. Most of their net worth is held in the form of real estate.

29. Plaintiff is informed and believes, and on that basis alleges, that between January 1, 1975 and the present date, the charitable entities have spent and continue to spend at least $1 million more each year than they receive in contributions and, for that reason, have been forced to liquidate some of their holdings in order to defray their current expenditures. All the excess of expenditures over receipts is attributable to the individual defendants' pilfering of the revenues of the charitable entities and their misappropriation of charitable assets to their own personal use and benefit, which pilfering and misappropriation continues to this very day on a massive scale. So long as the individual named defendants remain in full, effective and exclusive control of the business affairs of the charitable entities,

they alone will continue in the future, as they have in the past, to determine the nature and extent of all their expenditures.

30. Plaintiff is informed and believes, and on that basis alleges that during the last six months, as part of their program of misappropriating the assets of the charitable entities to their own use and in order to facilitate said misappropriation, the individual defendants have been liquidating the properties of the charitable entities on a massive scale; and that in Southern California alone, over twenty parcels of property belonging to one or more charitable entities have been sold in the last year, many of them at prices well below their market value.

31. Plaintiff is further informed and believes, and on the basis alleges that one of the largest properties of the College is a 1600-acre parcel in Big Sandy, Texas, which is worth substantially in excess of $10.6 million; yet the individual defendants have been attempting to sell the aforementioned parcel to a third party for approximately $10.6 million; and these defendants have attempted to conceal the true worth of the Big Sandy property, and have instead published false statements, known by them to be false, to the effect that the property aforesaid is worth only about $8 million. All these statements and activities are part of their effort to convert the assets of one or more of the charitable entities into a form in which they may be more easily appropriated to the personal use and benefit of the individual defendants. Further, plaintiff is informed and believes that the defendants have established no procedures or safeguards to ensure that the proceeds of sale of the Big Sandy property, which belong to the College and which ought to be used

exclusively for charitable and educational purposes, will be applied to that charitable use; but instead, defendants have announced publicly their intention to "get out of the college business," and to divert the proceeds of said sale to the Church and the Foundation, and to uses other than those for which they are entrusted.

32. Plaintiff is further informed and believes, and thereupon alleges, that the individual named defendants, in an effort to frustrate discovery of their wrongdoing and to obscure the facts, have caused and are causing the written records of their dealings to be removed from the Pasadena offices of the defendant corporations, and to be shredded and destroyed; and that if said removal and destruction are allowed to continue, it may never be possible to develop a true and complete accounting of the finances of the charitable entities during the time period complained of.

33. Since this action was commenced on January 2, 1979, and after a receiver was appointed herein, the individual defendants have pursued a course of conduct designed to divert donations, funds and assets of the charitable entities to themselves at Tucson, Arizona and elsewhere; and thereafter to apply said funds for their personal use and benefit in various ways, including the appointment of numerous firms of attorneys to represent their personal interest while ostensively acting as counsel for the charitable entities. In this regard, the individual defendants have purported to effect an amendment to the bylaws since the commencement of this action, granting them alleged indemnification for their legal expenses, not only in connection with the instant action and any other civil action which has been instituted by them or against

them in the state and federal courts, but also for any expenses they may incur in defending against criminal charges arising out crimes or alleged crimes committed by them against the charitable entities (as set forth at pages 11 and 12 of the purported bylaws attached to the Declaration of Helge, Exhibit 8 to this complaint). Plaintiff is further informed and believes, and thereupon alleges that the defendants have already paid or incurred legal expenses in connection with the present action and related litigation of nearly $1 million, all of which they have paid or intend to pay out of charitable funds properly the property of the charitable entities herein.

34. The appointment of receiver pendente lite for the charitable entities is necessary forthwith to prevent the continued misappropriation of charitable funds and assets to the personal use and benefit of the individual defendants; to halt the imminent and massive selling-off of valuable properties at prices well below their market value; and to prevent the further destruction of financial and business records of the charitable entities and to conduct an independent investigation of claims which the charitable entities may have against the individual named defendants and others, and thereafter to file and pursue such suits and actions on behalf of the charitable entities as may be appropriate.

AS A FIFTH CAUSE OF ACTION FOR INJUNCTIVE RELIEF PLAINTIFF ALLEGES:

35. Paragraphs 1 through 13 of the First Cause of Action, 15 through 22 of the Second Cause of Action, 24 through 26 of the Third Cause of Action, and 28 through 33 of the Fourth Cause of Action are hereby incorporated into and made a part of this Fifth Cause of Action.

36. The Receiver will require access to the books and records, and to the administrative facilities, of the charitable entities in order to discharge his duties, and in order to protect and preserve their assets pendente lite; but the individual named defendants threaten to deny such access to any person other than themselves, and have demonstrated an intention to remove and destroy said books, records, and facilities, rather than to let any other person see them; and unless enjoined and restrained from doing so by this Court, they will do so, and will not yield up the said assets and records to the receiver.

37. The individual named defendants are engaged in an on-going program of liquidation of charitable assets, and have already entered into agreements to sell many of said properties at prices well below their market value; and unless they and those with whom they deal are enjoined and restrained from doing so by this Court, they will sell, transfer, mortgage, and encumber said properties without providing any safeguards for their preservation and use for the charitable purposes impressed on such assets.

AS A SIXTH CAUSE OF ACTION FOR ACCOUNTING AGAINST DEFENDANT RADER, CORNWALL, KESSLER and PALAZZO, PLAINTIFF ALLEGES:

37. Paragraphs 1-13 of the First Cause of Action are incorporated by reference into and hereby made a part of this Sixth Cause of Action.

38. Plaintiff is informed and believes and on that basis alleges, that at all times relevant to this complaint, defendants Rader and Cornwall held the beneficial ownership of a majority of, and exercised actual control

over, defendant Rader, Cornwall, Kessler and Palazzo, which, until recently was known as Rader, Cornwall and Kessler.

39. Plaintiff is informed and believes and upon that basis alleges that at all times relevant to this complaint defendant Rader, Cornwall, Kessler and Palazzo acted as the outside accountants for the charitable entities; and in such capacity produced certified financial statements for Worldwide Church of God and Ambassador College, in which they rendered opinions as certified public accountants that such financial statements presented fairly the financial positions of those corporations. Plaintiff is informed and believes and on that basis alleges that as accountants for the charitable entities, defendant Rader, Cornwall, Kessler and Palazzo held a fiduciary position of great trust and confidence vis a vis such charitable entities in the course of which Rader, Cornwall, Kessler and Palazzo rendered financial advice to the management of such charitable entities. In addition plaintiff is informed and believes and on that basis alleges that at all times relevant to this complaint Rader was intimately involved with the management of the charitable entities as personal financial advisor to defendant Herbert W. Armstrong and as attorney for the charitable entities. As a consequence of its assumption of such fiduciary position defendant Rader, Cornwall, Kessler and Palazzo and its partners or shareholders were bound to avoid transactions in which their personal financial interests would conflict with those of the charitable entities.

40. Plaintiff is informed and believes and on that basis alleges that defendants Rader and Cornwall used their positions of trust and confidence with the charitable entities to divert assets of those entities to their

benefit, in an amount unknown to plaintiff, by devising, recommending and implementing unfair and fraudulent business transactions between the charitable entities and themselves personally, or between the charitable entities and various of the for-profit defendants in which either or both of them had ownership interests, or from which they otherwise derived financial benefit, which transactions resulted in personal profit to Rader and/or Cornwall. Plaintiff is informed and believes and on that basis alleges that Rader and Cornwall accomplished the said diversions of charitable assets while acting or purporting to act for and on behalf of defendant Rader, Cornwall, Kessler and Palazzo as partners and/or members thereof.

41. The full nature and extent of the dealings between defendant Rader, Cornwall, Kessler and Palazzo and the charitable entities are not now known to plaintiff, but are peculiarly within the knowledge of defendants. Plaintiff will ask leave of court to amend this complaint to show the exact nature and extent of such dealings when the same have been ascertained.

42. Rader, Cornwall, Kessler and Palazzo are legally required to account to plaintiff for all of the said dealings, and transactions between itself and/or its partners, and the charitable entities, and may be surcharged and held liable for any breaches of trust or diversions of charitable assets resulting from such dealings or transactions.

WHEREFORE PLAINTIFF PRAYS:

1. For an order requiring defendants to make a full and complete accounting to this Court of the affairs of the defendant charitable entities from January 1, 1975 through the date of said accounting; and for a further accounting of the third tithe, and of

all transactions between any of the defendant charitable entities and any of the individual defendants or the defendant for-profit entities, from January 1, 1970 through the date of said accounting;

2. For an order removing the defendants Rader, Gotoh, Kuhn, Wright, Cornwall, and Helge from holding any office or employment in or under the defendant charitable entities, and cancelling and nullifying any contracts of employment which which may have heretofore been entered between them and said entities and further enjoining and restraining said defendants from holding any office of employment under the said chariable entities in the future, or in or under any California charitable corporation trust or charitable organization;

3. For an order directing the defendants Worldwide Church of God, Ambassador College, Inc., and Ambassador International Cultural Foundation to comply with their obligations under the laws of the State of California pertaining to nonprofit organizations organized for charitable purposes; and in the event of their failure so to comply, for such additional equitable relief as may be necessary, appropriate or requisite in the premises to secure the preservation and proper application of the charitable funds presently in their possession and under their control;

4. For an order appointing a receiver pendente lite to take possession, until further order of this Court, of all the property of the defendant charitable entities aforesaid, and of their books and records, and empowering him to take such actions as he deems, in the reasonable exercise of his discretion, appropriate to recover property and assets wrongfully taken from them, and to prevent the further dissipation of charitable property and assets, said power to include without

limitation the power to bring lawsuits in the name of the charitable entities, and to retain independent accountants, lawyers, and other professional assistants to assist him in the prosecution of such lawsuits;

5. For an injunction restraining the named individual defendants, their agents, employees, and all persons acting in concert with them, from interfering in any way with the actions of said receiver, and requiring them furthermore to yield up to said receiver all the books, records, and administrative facilities of said charitable entities;

6. For an injunction restraining the named individual defendants, their agents, employees, and all persons acting in concert with them, from selling or mortgaging, or asserting ownership in any other way, over the property or assets of any of the charitable entities, except as the court-appointed receiver may allow;

7. For costs of suit herein;

8. For such other and different or further relief as to this Court may seem just and proper.

Dated: July 30, 1979.

GEORGE DEUKMEJIAN, Attorney General
LAWRENCE R. TAPPER,
JAMES M. CORDI,
WILLIAM S. ABBEY,
LAUREN R. BRAINARD,
Deputy Attorneys General

By JAMES M. CORDI
Deputy Attorney General
Attorneys for Plaintiff.

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-205

STANLEY R. RADER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petitioner's Reply Brief in Support of Petition for Writ of Certiorari.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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INTRODUCTION.

The State of California's characterization of its action against the Worldwide Church of God and its impact on constitutional freedom of religion create a numbing sense of disbelief. The State describes the action simply as one for an accounting, as though the notion that a Church must account to the State for its income and expenditures were not the least startling on its face. Nowhere does the State's Brief mention that the action seeks to remove Church officers; and bar them in perpetuity from Church office or employment; that it seeks to restructure the form of Church governance; that it seeks appointment of a receiver to assume possession, management and control of all of the assets, books and records of the Church, Ambassador College and Ambassador International Foundation until further order of court. Nowhere does the

State explain that its charges of wrongdoing and its misrepresentations of the record are irrelevant to its supposed power to force disclosure of Church documents, to determine what are and are not proper religious expenditures, to dictate the form of Church governance, to pick and choose who shall and shall not be a Church official.

That the State's transformation of the Church from a religious body to a "charitable trust" is presented in softened form to this Court does not render that transformation any less unprecedented and unconstitutional. The State does not disavow, but simply refrains from repeating, its position that *the Church is no better than a ward of the State!*

Instead, the State bruits so-called evidence of "self-dealing" by Petitioner in a manner which is procedurally and factually inaccurate. To briefly set the record straight—(1) the hearing on January 10-12 was limited to matters alleged to support the January 2 *ex parte* appointment of a receiver. The State produced no credible evidence to support its sensational charges of massive misappropriation, document shredding and the rest, and the trial court so found; (2) the matter of Petitioner's compensation as a Church employee and certain business dealings of the Church over a span of more than a decade were, as acknowledged by the court, collateral to the proceeding; cursory examination of these topics was admitted solely as "background"; (3) counsel for Petitioner repeatedly offered to present the true complete facts regarding Petitioner's relations with the Church (from 1957 to 1969 he performed legal and accounting services; in 1969 at the request of the Church's Pastor General he organized a company to purchase media time for the Church;

in 1975 he became a Church member and officer and ended all outside employment and associations) to substitute for the State's innuendo. The court refused to expand the scope of the proceedings to accept such evidence on behalf of Petitioner (R.T. Jan. 10-12, pp. 147-153, 162-163, 199-201).

As little deference as the State pays the truth, it pays even less to the First Amendment which it buries in a flurry of hollow shibboleths—"charitable trust" and "neutral principles of law." Yet it is clear beyond question that both the State's end-goals in the action and the very litigation process (including depositions, interrogatories and compelled production of documents) infringe the Free Exercise and Establishment Clauses of the First Amendment and unconstitutionally entangle the State in Church affairs.

It is no coincidence that, with the stay of the receivership imposed on the Church, the State's efforts to interrogate Petitioner and others accelerated. If the receivership were not evidence enough, these discovery efforts clearly show that the State is intent on achieving untrammeled access to Church books, records and information merely by initiating suit, however groundless without any showing or proof of wrongdoing.

Merely by filing suit and vigorously pursuing discovery the State accomplishes procedurally what it could never do substantively—a regular reporting, accounting and justification by the Church to its self-appointed bureaucratic overseers. Thus, the State has turned the First Amendment on its head. Instead of requiring the State to bear the heavy burden of attempting to justify unprecedented intrusion into areas protected by the First

Amendment (see, *e.g., Buckley v. Valeo,* 424 U.S. 1, 64-66 (1974), the State has shifted the burden to Petitioner and the Church to prove their innocence of the State's groundless charges (see *Speiser v. Randall,* 357 U.S. 513, 524 (1958)). Indeed, while the State would have this Court believe the Church is using religion to mask fiscal fraud, the sorry truth is that the State is using spectacular and groundless charges of fiscal fraud to make an unprecedented intrusion into the very core of religious autonomy and privacy.

Petitioner respectfully submits this Reply Brief for the purposes of showing:

1. The State's action against the Worldwide Church of God and the effort to depose Petitioner constitute a continuing violation of rights of religious freedom guaranteed by the First Amendment;

2. Measured by the appropriate compelling state-interest standard, the action and its attendant discovery procedures are inescapably unconstitutional; and,

3. Petitioner's First and Fourteenth Amendment arguments are unanswered by the State.

SUPPLEMENTAL STATEMENT OF FACTS.

Subsequent to the filing of Petition for Writ of Certiorari, the State of California's motion to hold Petitioner in contempt for failure to appear to resume his deposition was heard on August 7, 1979. The trial court did not hold Petitioner in contempt, but ordered that he appear for deposition on August 27.

On August 7, Petitioner was in the People's Republic of China making advance preparations for the arrival of Herbert W. Armstrong, Pastor General of the Worldwide Church of God, to spread the gospel of Jesus

Christ. Petitioner was unable to return to this country as expected by August 27. Upon learning of this fact, counsel for Petitioner sought a stipulated continuance of his deposition from the Attorney General's Office, which was denied. The trial court declined to grant an *ex parte* application for continuance, and counsel thereupon noticed motion for continuance. This motion was heard on September 21, 1979, and Petitioner was ordered to appear for deposition on October 22.

LEGAL ARGUMENT.

I

THE LITIGATION PROCESS, INCLUDING THE DEPOSITION OF PETITIONER, ITSELF RESULTS IN UNCONSTITUTIONAL INFRINGEMENT OF RELIGIOUS LIBERTY.

It is frankly incredible that the State of California would attempt to maintain the pretense that its action against the Worldwide Church of God is unaffected by the First Amendment. *McCormick v. Hirsch*, 460 F.Supp. 1337 (M.D. Pa. 1978), affords a convenient checklist of the various respects in which the action infringes religious liberty:

> "The [Supreme] Court in applying this [entanglement] test has shown a particular concern and has *sought to avoid* active involvement of the sovereign in religious activities, the risk inherent in programs that bring about an administrative relationship between public bodies and [churches], governmental evaluation and standards with respect to religious practices, any kind of day-to-day relationship between church and state, extensive investigation into church operations or finances, any sustained or detailed administrative standard, . . . and the entanglement of government in difficult classifications of what is or is not religious. *The listing of these suspect areas of entanglement illustrates the kinds of involvement with a church entity that will simply not be tolerated.*" (Fn. omitted; final emphasis added.)

Patently the State's goals in this action fall within the realm of proscribed State activities. Equally important, however, is that the very litigation process itself,

depositions of Petitioner, Herbert W. Armstrong (Pastor General of the Church) and others, compelled production of documents and the like entails the same entanglement of Church and State. (See *Buckley v. Valeo, supra*, 424 U.S. 1, 64-66; *Shelton v. Tucker*, 364 U.S. 479, 488-490 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544-545 (1963); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).)

The recent case of *Surinach v. Pesquera de Busquets*, ... F.2d .... (1st Cir. No. 78-1527), is squarely on point on its facts. There, the Secretary of the Department of Consumer Affairs of the Commonwealth of Puerto Rico launched an investigation of the costs of private schools operating in Puerto Rico, an investigation which encompassed parochial schools under the aegis of the Roman Catholic Church. The Secretary ordered various church and school officials to provide him with specified documents and books and to furnish such information as the school's annual budgets for the three previous years; the source of their finances (registrations, donations, governmental and others); costs of transportation; student cost per academic grade for registration, admission dues, activities, medical insurance, nourishment services, materials and school uniforms; the salaries paid to teachers, administrative, maintenance and other personnel; book costs and invoices per grade and their resale prices as well as the names and addresses of book suppliers; and scholarships and the criteria upon which they were awarded; the plaintiffs refused compliance with the order and brought suit alleging that the Secretary's actions were in violation of the Religion Clauses of the First Amendment and constituted an impermissible entanglement of the affairs of church and state.

The District Court dismissed the action, adopting the same argument made by the State of California herein that "The general investigation to which [the Catholic schools] are being subjected does not penalize, hinder or otherwise curtail any religious practice of plaintiffs"[1] and that the amount of entanglement engendered at least in the preliminary information gathering stages of the investigation fell short of a constitutional transgression. The Court of Appeals, through Chief Judge Coffin, reversed, making at least ten points pertinent to our case:

a. The District Court's "bifurcation of the gathering of the information and the purpose for which it is sought strikes us as both artificial and constitutionally unsound. . . . The gathering of information is not viewed as an end in itself." (p. 4.)[2]

b. "[I]n the sensitive area of First Amendment religious freedoms, the burden is upon the State to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of the religion to an extent which the constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems." (p. 6.)

c. "While we agree that there has been no showing of any purpose to inhibit religion, the effect

[1]Compare Opposition, page 12: "Thus the purpose of this lawsuit . . . does not impact in any way upon religious doctrine or practice. Therefore, cases involving government regulations or actions which adversely affect religious doctrine or practice are not in point."

[2]Page references are to the Slip Opinion of *Surinach*.

of the Commonwealth's actions, even though aimed at private schools in general, constitutes a palpable threat of state interference with the internal policies and beliefs of these church-related schools. . . . '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' " (pp. 7-8)

d. "We think it clear that the eventual use to which the school's cost information could be put could interfere seriously with these religious duties and objectives. The Department, sifting through the details of the school's budgets and holding its hearings, may conclude that costs are rising too fast and must be contained to a specified level. While such a determination might be consistent with the Department's mandate, it surely could clash with what is a religious belief and practice of those who administer these schools, namely that the highest quality education possible must be provided to their students. We do not suggest that quality of education and the expenditure of money invariably are linked, but it would be unrealistic to assume that the curricula and facilities of these schools would not be curtailed and hence religious objectives affected if they were forced to contain their costs." (p. 9)

e. "[I]t seems likely that as the regulatory process unfolds, some determinations of which costs are 'necessary' and 'reasonable' in the running of a private school would have to be made. . . . [T]he value judgments and sense of priorities

of the regulator and regulatee are likely to be grounded in wholly different concerns. And whether the schools were to be ordered specifically to increase teacher-student ratio as a means of cost containment, or whether that factor merely would figure in the Department's conclusion and order that costs in general must be contained, a wholly secular objective would be furthered at the expense of one which is religious. We find it scant comfort that no such judgments have yet been brought to bear by the Department, or that the Department might ultimately conclude that the costs of these schools need not be contained by government controls. The appellants' ability to make decisions concerning the recruitment, allocation and expenditure of their funds is intimately bound up in their mission of religious education and thus is protected by the free exercise clause of the First Amendment." (pp. 9-10)

f. "The Department's attempts to take its first steps down its regulatory road by gathering information accordingly are suspect, both in light of the purpose for which the information is sought and in itself, for as has long been recognized, 'compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.' [Citation.] We see that potential in the chilling of the decision-making process, occasioned by the threat that those decisions will become the subject of public hearings and that eventually, if found wanting, will be supplanted by governmental control. [Citation.] And even if that governmental control

should not come to pass, disclosure of the schools' finances—from amounts of donations to details of expenditures—could provide private groups or the press with the tools for accomplishing much the same ends." (p. 10)

g. "The subpoenas which generated this controversy sought extremely detailed information about the expenditure of funds of these Catholic schools. If the schools are forced to comply, that information will be subjected to governmental perusal, to public examination, and ultimately may form the basis for significant governmental involvement in their fiscal management. Even if we were able to countenance the degree of entanglement occasioned by the government's involvement in these details of fiscal administration, we could not feel confident that an end to that involvement was in sight. To the contrary, with ceilings in place, the Commonwealth would have the ongoing powers necessary to insure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities. [Citations.] This governmental program thus has the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement." (p. 11)

h. "Unlike the programs in *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], this regulatory scheme does not call upon the state to identify certain expenses as religious or secular. It does, however, permit it to intrude upon decisions of

religious authorities as to how much money should be expended and how funds should best be allotted to serve the religious goals of the schools. Either form of involvement strikes us as 'a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.' " (p. 12)

i. "[T]he Secretary's demands for the financial data of these schools both burden the free exercise of religion and pose a threat of entanglement between the affairs of church and state. . . ." (p. 12)

j. Since the Commonwealth failed to demonstrate a compelling state interest or that it had pursued its objectives in the manner least intrusive upon religious freedom the judgment was reversed and the District Court was directed to enter an order declaring unconstitutional the challenged orders and permanently enjoining the Department from enforcing such orders. (pp. 12-15)[3]

[3]A case similar in some respects is *Fernandes v. Limmer*, 465 F.Supp. 493 (N.D. Tex. 1979). There, a resolution/ordinance restricting solicitation at a local airport included a provision making the cost of solicitation presumptively unreasonable when it exceeded 25% of the amount collected. To enforce this provision the resolution/ordinance permitted examination of all accounting and bookkeeping records, tax records, etc., of a charity for audit. As applied to a religious organization, the District Court held:

> "Recent Supreme Court cases . . . clearly indicate that this type of financial inquiry into the use of church funds is not constitutionally permissible . . . [¶] No church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without showing compelling needs achievable by no adequate alternative. Unless such a need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the Society and deal with it financially is great, as is the impact of the Churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside [citations]. [¶]. . . . These provisions for financial disclosure, etc., are thus unconstitutional on their face." (Footnote omitted; at pp. 504-505.)

These cases elaborate on the consistent holdings of this Court to the effect that the First Amendment "has erected a wall between church and state which must be kept high and impregnable." (*McCollum v. Board of Education*, 333 U.S. 203, 212 (1947); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).) It cannot be the case that this wall topples simply because the State files a lawsuit or fabricates some other basis for intervention in religious affairs. If the wall ever meant anything, now is the time it must be buttressed.

II

NO COMPELLING STATE INTEREST SUPPORTS THE STATE'S ACTION AGAINST THE WORLDWIDE CHURCH OF GOD AND ITS EFFORT TO DEPOSE PETITIONER. NOR IS THIS SWEEPING INVASION OF FIRST AMENDMENT FREEDOMS THE LEAST INTRUSIVE MEANS OF PURSUING ANY LEGITIMATE INTEREST THE STATE MAY HAVE.

A. No Compelling State Interest Justifies These Proceedings.

State action resulting in establishment of religion or impairing its free exercise must be supported by a compelling state interest which cannot be furthered by action less intrusive on religious liberty. (*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).)

"[O]nly those interests of the highest order" have been found sufficiently compelling to legitimize impair-

ment of the fundamental rights secured by the First Amendment. (See *Wisconsin v. Yoder, supra,* 406 U.S. 205, 215.) "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." (*Sherbert v. Verner, supra,* 374 U.S. 398, 403.) Such compelling interests are few in number (see *e.g., Gillette v. United States,* 410 U.S. 437, 462 (1971); *Prince v. Massachusetts,* 321 U.S. 158, 168-169 (1944)); not surprisingly, their number does not include "to halt and correct fraudulent diversion" of church funds.

One obvious reason why "to halt and correct" fraud is not a compelling state interest is that there is no necessary role for the State in a true fraud proceeding in California. Ordinarily persons who consider themselves victimized are fully capable of seeking legal redress without the intervention of the State. Even in the case of non-religious charities, if for some reason their officers or directors could not sue, corrective action could be brought by any responsible individuals within the organization. (*San Diego etc. Boy Scouts of America v. City of Escondido,* 14 Cal.App.3d 189, 195, 92 Cal.Rptr. 69 (1971).)[3a] In any event, if California's law on standing to sue compelled State intervention in religious affairs, the law of standing should be changed to accommodate the First Amendment, not vice versa. (See *Jones v. Wolf,* ..... U.S. ....., 61 L.Ed.2d 775, 787-788 (1979).)

[3a]The State's misplaced zeal has resulted in more than one misstatement of California law. Compare, for example, the description of state law at Opposition, page 12, footnote 7, with the provisions of the California Civil Code section 2228-2235 cited as support.

B. The State's Supposed Interest in Dealing With Alleged Fraud Can Be Served Without Such Violent Impact on Religious Freedoms.

Even if it is assumed, *arguendo,* that the State has some legitimate interest underlying the lawsuit, it must demonstrate that this interest cannot be served without such drastic invasion of First Amendment rights. The State has made no attempt to and cannot satisfy this burden.

Fraud prevention or correction is one of the most frequently asserted bases for state action infringing on First Amendment rights. The consistent answer of the courts is that the state should pursue this interest by prosecution under its criminal laws.

As concisely put in *Intern. Soc. for Krishna Consciousness v. Bowen,* 600 F.2d 667, 669 (7th Cir. 1979):

> "The interest in combating fraud is served by the use of penal laws to punish this conduct."

Accord:

Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) ["Nothing we have said is intended even remotely to imply that under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."];

Schneider v. Irvington, 308 U.S. 147, 164 (1939) ["Frauds may be denounced as offenses and punished by law."].

See, also:

Sherbert v. Verner, supra, 374 U.S. 398, 407;

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 109-110 (1952);

Davis v. Beason, 133 U.S. 333, 342-343 (1890);

Fernandes v. Limmer, supra, 465 F.Supp. 493, 503.

The State has consistently accused Petitioner and others of criminal conduct. The State has said that *before* this action was even begun it had evidence "to a substantial certainty" that Petitioner and others were guilty of "misappropriation of millions of dollars in Church assets".[4] Plainly, the State, to the extent it has any interest in these matters, should pursue them in a manner which is not calculated to destroy the rights of religious freedom of the Church and members, including Petitioner.

The State's periodic suggestion that criminal proceedings would not result in recoupment of alleged misappropriations is manifestly disingenuous. The Attorney General stated as long ago as February 21 that its action included "no prayer for recovery of defalcations" and contemplated additional lawsuits in the event misconduct were proven. (R.T. Feb. 21, 1979, p. 145.) Obviously criminal proceedings would afford the same groundwork for subsequent lawsuits if wrongdoing were proven.[5] In fact, if criminal conduct could be proven, there would be no need for such subsequent civil actions since California law permits that restitution may be required as a condition of probation. (California Penal Code §1203.01.)

[4]Petitioner is confident the State has no such evidence. What the State is really saying is that it disapproves of the manner in which the Church spends money in accomplishing its religious mission of spreading the gospel of Jesus Christ. But if the State may inquire into this area with this Church, it may make similar inquiry with all other churches, including inquiry into the expenditures of the Catholic Church in connection with the recent travels of Pope John Paul II.

[5]Indeed, the Attorney General appears to be following an exactly contrary path, using nominally civil proceedings for the purpose of discovering whether there was criminal conduct.

Thus it is plain that if the State's interest were as it is described to this Court it could be served by means less invasive of freedom of religion. This is further illustration that the State's underlying premise is not that it may demand that the Church account, have unlimited access to Church records and information, remove and replace its leaders, and determine how the Church should perform its religious functions only when it alleges wrongdoing, but rather that the State may do so at any time it pleases by virtue of a supposed general supervisory power over churches. The premise is profoundly wrong.

The action as a whole and the very litigation process itself constitute a sweeping invasion of First Amendment rights. Accordingly, the order that Petitioner appear for deposition in these unconstitutional proceedings should be vacated.

III

THE ORDER THAT PETITIONER APPEAR FOR DEPOSITION VIOLATES HIS RIGHTS TO REMAIN SILENT AND TO DUE PROCESS OF LAW.

Petitioner's Fifth and Fourteenth Amendment arguments are unanswered by the State's Opposition Brief.

a. The Attorney General does not deny that his office is working in close cooperation with other criminal law enforcement agencies, or that it is funneling information obtained in this supposedly civil proceeding to such agencies.

b. The Attorney General does not explain why, if in 1978 his office had evidence "to a substantial certainty" that Petitioner was "guilty of misuse and misappropriation of millions of dollars" no criminal proceedings were brought.

c. The Attorney General does not disclaim an effort to use this lawsuit as a "shortcut to goals otherwise barred or more difficult to reach" (*United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958)).

d. The Attorney General cannot seriously assert that Petitioner's status as a lawyer or the fact he has counsel means Petitioner has no right to remain silent. It was, after all, the Attorney General who advised Petitioner of his right to remain silent and his right not to testify at all in this proceeding.

e. The Attorney General contradicts his earlier position that he would not attempt to question Petitioner if Petitioner would make a blanket refusal to testify on grounds of self-incrimination by now suggesting that Petitioner's only right is to claim a right against self-incrimination on a question-by-question basis. This clearly shows the Attorney General is interested less in the validity of such a claim than in forcing Petitioner to make it.

For the numerous reasons previously cited, Petitioner submits the order compelling him to appear for deposition following invocation of his right to remain silent is void under the Fifth and Fourteenth Amendments.

CONCLUSION.

While the receivership of the Church has been temporarily stayed, the destruction of First Amendment rights proceeds. The State demands and the trial court grants virtually the same unlimited access to the most detailed and confidential Church information. The order for Petitioner to testify is only one of a continuous stream of such orders. If these efforts succeed *now* it will hardly matter that, at some *future* time, this Court will vindicate the First Amendment rights of Petitioner and the other nearly 100,000 members of the Worldwide Church of God.

Respectfully submitted,

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